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TRANSCRIPT OF RECORD

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 9146

GLOBE LIQUOR COMPANY, INC.,
A CORPORATION,
Plaintiff-Appellee,

vs.

FRANK SAN ROMAN and DOROTHEA SAN ROMAN,
Doing Business Under the Firm Name and Style of
INTERNATIONAL [illegible],
Defendants-Appellants.

U. S. C. C. A. - 7
FILED
OCT 28 1946
KENNETH [illegible]
CLERK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

TRANSCRIPT OF RECORD FILED JULY 18, 1946
PRINTED RECORD

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 9146

GLOBE LIQUOR COMPANY, INC.,
A CORPORATION,
Plaintiff-Appellee,

VS.

FRANK SAN ROMAN and DOROTHEA SAN ROMAN,
Doing Business Under the Firm Name and Style of
INTERNATIONAL INDUSTRIES,
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 205

GLOBE LIQUOR COMPANY, INC., PETITIONER,

vs.

FRANK SAN ROMAN AND DOROTHEA SAN ROMAN, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF INTERNATIONAL INDUSTRIES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 11, 1947.

CERTIORARI GRANTED OCTOBER 13, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 205

GLOBE LIQUOR COMPANY, INC., A CORPORATION,

Petitioner,

vs.

FRANK SAN ROMAN AND DOROTHEA SAN ROMAN, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF INTERNATIONAL INDUSTRIES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of March (it being the fourth day thereof) in the year of our Lord One Thousand Nine Hundred and Forty-Six and of the Independence of the United States of America, the 170th year.

Present:

Honorable John P. Barnes, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. LaBuy, District Judge
Honorable Elwyn R. Shaw, District Judge
Honorable William H. Holly, District Judge

Roy H. Johnson, Clerk
William H. McDonnell, Marshal

Thursday, March 14, 1946

Court met pursuant to adjournment

Present: Honorable John P. Barnes, Trial Judge.

2 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

Globe Liquor Co., Inc.
a Delaware corporation,
Plaintiff

vs.

Frank San Roman and Dorothea San Roman doing business under the firm name and style of International Industries,
Defendants

No. 45 C 120

Be It Remembered, that the above-entitled action was commenced by the filing of the following Complaint in the above-entitled cause, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 29th day of January, 1945:

3 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 45 C 120) • •

COMPLAINT.

Globe Liquor Co., Inc., a corporation duly organized and existing under the laws of the State of Delaware (hereinafter sometimes termed "plaintiff"), by its duly authorized attorneys, Ben W. Heineman, Max Swiren and Joseph P. Antonow, Chicago, Illinois, and H. Albert Young, Wilmington, Delaware, complaining of Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries (hereinafter sometimes termed "defendants"), alleges:

1. The jurisdiction of this Court depends upon the diversity of citizenship of the parties. The plaintiff is a corporation duly organized and existing under the laws of the State of Delaware, having principal place of business at Wilmington, Delaware. The defendants and each

of them are residents of the City of Chicago, County
4 of Cook, State of Illinois. The amount in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000.00).

2. By purchase order dated March 16, 1944, and an exchange of letters dated, respectively, March 24, 1944 and March 27, 1944, the plaintiff agreed to purchase and receive from the defendants, through the defendants' agent and salesman, one Gabriel H. Todes, and the defendants agreed to sell and deliver to the plaintiff seven hundred and fifty (750) cases of Mexican Tequila, more fully described as Mariachi Tequila Gold, in good merchantable condition, fit for human consumption, at a price of ten dollars and seventy-five cents ($10.75) the case, C.I.F. Laredo, Texas, the plaintiff to furnish the defendants with a letter of credit irrevocable for sixty (60) days and payable to the defendants or their assigns, in the full amount of the purchase price, to wit, eight thousand sixty-two dollars and fifty cents ($8,062.50). Copies of the purchase order of March 16, 1944 and the letters dated March 24, 1944 and March 27, 1944 are annexed hereto and marked Exhibits "A," "B" and "C", respectively and by this reference thereto made a part hereof.

3. On or about March 29, 1944, the Chase National Bank, a national banking association having principal place of business in the City of New York, State of
5 New York, issued its irrevocable commercial letter of credit No. 25668 in the amount of eight thousand sixty-two dollars and fifty cents ($8,062.50) to the defendants or their assigns, and at all times and in all other respects and particulars the plaintiff conformed to the terms of its agreement with the defendants. A copy of said letter of credit is annexed hereto marked Exhibit "D" and by this reference thereto made a part hereof. At the request of the defendants, said letter of credit was extended by the said The Chase National Bank to and including June 15, 1944, and amended in other particulars immaterial hereto.

4. By letter dated May 27, 1944 the defendants advised the plaintiff that the seven hundred and fifty (750) cases of Mariachi Tequila Gold were shipped from Mexico on May 22, 1944 in Car RI-159322. A copy of said letter is annexed hereto marked Exhibit "E" and by this reference thereto made a part hereof.

5. On or about July 11, 1944 said seven hundred and fifty (750) cases of Mariachi Tequila Gold were inspected by the United States Food and Drug Administration and found to be adulterated under Section 402(a)(1) of the Food, Drug and Cosmetic Act of 1938 as containing a foreign substance dangerous to health, to wit, glass particles. Copy of the notice of said Food and Drug Administration is annexed hereto marked Exhibit "F" and by this reference made a part hereof.

6 6. At some time prior to July 11, 1944, the defendants did negotiate said irrevocable letter of credit and the agreed purchase price of said seven hundred and fifty (750) cases of Mariachi Tequila Gold has been paid in full by the plaintiff. Nevertheless, said defendants failed and refused to deliver said seven hundred and fifty (750) cases of Mariachi Tequila Gold to plaintiff in good merchantable condition fit for human consumption in violation of their agreement so to do, all to the plaintiff's damage.

7. In addition to the foregoing, and in direct consequence of said violation by the defendants and each of them of said agreement with the plaintiff, the plaintiff has suffered additional damage of one thousand sixty-three dollars and seventy-five cents ($1,063.70) by virtue of certain expenses necessarily incurred and paid by plaintiff in connection with the purchase of seven hundred and fifty (750) cases of Mariachi Tequila Gold, more specifically set forth as follows; to wit:

Cost of Irrevocable Letter of Credit	$19.69
9000 Internal Revenue Strp Stamps	90.00
Cutting and Imprinting Strip Stamps	12.75
Forwarding Expenses to Mexico—Strip Stamps	14.49
Preparing and Handling of I. T. Entry at Laredo, Texas	11.37
Expenses in Connection with Preparation and Handling Customs Entry at Wilmington, Delaware	85.70
Miscellaneous Telephone and Telegraph Charges	25.00
Freight Charges from Laredo, Texas, to Wilmington, Delaware	592.25
Customs Storage at rate of 5c per Case, per Month from July 1, 1944 to January 1, 1945	232.50
Total	$1,063.75

Wherefore, plaintiff prays judgment be rendered against the defendants and each of them in favor of he plaintiff in the amount of nine thousand one hundred nd forty-six dollars and twenty-five cents ($9,146.25) ogether with interest thereon at the legal rate from July 11, 1944, and the costs of this proceeding.

Globe Liquor Co., Inc., Plaintiff.
By s/ *Ben W. Heineman*
Ben W. Heineman

s/ *Ben W. Heineman*
Ben W. Heineman
Attorney-at-law.
Suite 1406,
135 South LaSalle Street,
Chicago 3, Illinois.

8 EXHIBIT "A"

Order No. ..... Date.....3/16/44.....
M..... International Industries .....
Ship To.....600 So. Michigan Ave. .....
At..... Chicago .....
How Ship ..... Globe Liquor Co. .....
.....Wilmington, Del. .....

750 Ca. 5's Tequila $10.50
(Mariachi Gold)
C.I.F. Laredo, Texas
60-day letter of credit
Import License I-1408
Globe Liquor Co.,
By: M. L. Lazarus

9 **EXHIBIT "B"**

GABRIEL H. TODES
903 Lake Drive
Baltimore 17, Maryland

March 24, 1944

Mr. Morton Lazarus,
Globe Liquor Company,
18th and Market Streets,
Wilmington, Delaware.

Dear Mr. Lazarus:

This will confirm our telephone conversation of this morning relative to your order of Mariachi Tequila Gold, wherein the price for the Gold is $10.75, which is 25c more than the White, and which was agreeable to you.

Will you please forward to me your confirmation on this price, as I have already advised International Industries to cable your order to Mexico.

Please execute your letter of credit exactly in accordance with the form which I left with you, with the exception of changing the price from $10.50 to $10.75, and substituting your own customs broker in the place of Jovita Perez, if you so desire.

I wish to take this opportunity to thank you again for your patronage.

Kindest regards,
(Signed)
Gabriel H. Todes

ght/pn
cc: International Industries

10 **EXHIBIT "C"**

Zone 246

March 27, 1944

Mr. Gabriel H. Todes
903 Lake Drive
Baltimore, 17, Maryland

Dear Gabe:

This confirms our order placed with you last week for 750 cases of Mariachi Tequila Gold @ $10.75 f. o. b. Laredo, Texas. We have put through the letter of credit in

accordance with the specimen you left here; but I changed to Tequila where you had the word Vodka.

Be sure to instruct the International Industries that these cases cannot come into Delaware without the Delaware State stickers which will be sent to any address that is specified when they notified us that the shipment is ready to come forward.

These stickers are only sent after we have paid the state tax, so that you should wire us in ample time for us to pay the tax and have these stickers forwarded—one to be put on each case.

Trusting that this is clear to you and with kind personal regards,

Very truly yours,
Globe Liquor Co., Inc.
s/ Morton Lazarus
Vice President

ML:MS

11

EXHIBIT "D"

THE CHASE NATIONAL BANK
Of the City of New York
Pine Street Corner of Nassau
NEW YORK

Cable Address Chasebank, New York

Irrevocable Commercial Letter of Credit

$8,062.50

March 29, 1944

No. 25668

International Industries
600 S. *Michigan Avenue*
Chicago, Illinois

Gentlemen:

We hereby authorize you to draw on *The Chase National Bank, New York* by order of *Wilmington Trust Company Wilmington, Delaware* and for account of *Globe Liquor Co. Inc.* up to an aggregate amount of *Eight Thousand Sixty-two Dollars and Fifty cents* (*U. S. Currency*) available by your drafts *at sight for full invoice value, payable at First National Bank of Chicago, Chicago, Illinois. Accompanied by: Mexican Shippers' Commercial Invoice in triplicate, showing "750 cases of Tequila (Gold color) at $10.75 per case, CIF Laredo, Texas"*

*Consular invoice in duplicate Insurance certificate Original bill of lading issued to order of Mexican Shipper blank endorsed evidencing shipment of 750 cases of Tequila to Laredo, Texas. * * * Partial shipments are not permitted. * * * Of the above documents the original consular invoice and original bill of lading are to be forwarded by the negotiating bank direct to Jovita Perez, 112 Convent Ave., Laredo, Texas. Certificate to this effect and the remaining documents are to accompany the draft. * * * This credit may be assigned, provided the assignee is a person, firm or corporation, in whose favor the issuance of this credit is permissible under the Trading with the Enemy Act of the USA and Executive Orders and * *

Drafts must be drawn and negotiated not later than *May* 28, 1944.

Each draft must state that it is "Drawn under Letter of Credit of The Chase National Bank, New York, No. 25668 Dated *March* 29, 1944", and the amount endorsed on this letter of credit.

We hereby agree with the drawers, endorsers, and bona fide holders of all drafts drawn under and in compliance with the terms of this credit, that such drafts will be duly honored upon presentation to the drawee. * * *Regulations issued thereunder. Should drafts under this credit be drawn by assignee they must be accompanied by your letter of assignment.*

Yours very truly,
J W

.....
Second Vice President
Assistant Cashier

J C Y

.....
Assistant Manager, Foreign Department

AS-ds

NON-NEGOTIABLE COPY

(Italics indicate typewriting.)

EXHIBIT "E"

12 INTERNATIONAL INDUSTRIES
600 South Michigan Avenue
Chicago 5, Illinois, U.S.A.
May 27, 1944

Globe Liquor Co., Inc.
18th and Market Streets
Wilmington, Delaware
Att: Mr. M. L. Lazarus

Gentlemen:
We are pleased to advise that your lot of Mariachi Tequila was shipped from Mexico May 22nd in Car RI-159322. We would suggest therefore, that you communicate with your broker in Laredo.

Yours very truly,
International Industries
(Signed)
F. San Roman
Managing-Director

F. San Roman
PM
cc: G. H. Todes

13 EXHIBIT "F"

Federal Security Agency
FOOD AND DRUG ADMINISTRATION
12-4 U. S. Customhouse, Phila-6, Pa.
July 12, 1944

John A. Steer & Co.
Drexel Building,
Philadelphia-6, Pa.

(Stamp) Received Jul 14 1944 Customs Office Wilmington Del.

Lab. No. P-5300

Sir:
Inspection and analysis of the sample from the following-described shipment having led to the result indicated below, you are hereby notified that action under the provisions of the Federal Food, Drug, and Cosmetic Act,

June 25, 1938, as to the exclusion of said shipment from consumption in the United States will be taken at the station of the Federal Security Agency at the above address three days (Sundays and holidays not included) from the above date, at which time and place you may be present and submit testimony, or at or before which time you may file a statement in writing.

(swm)

cc to: Collector - 2

" Wilmington, Del. - 1

Respectfully,
C. S. Brinton
C. S. Brinton
Chief of Station.

DESCRIPTION OF SHIPMENT

Lab. No. .....P-5300.....
Label....."Mariachi Tequila Imported, Prod. of Mexico 100 proof 4/5 Quart"
Broker Consignee—John A. Steer & Co., Drexel Bldg., Phila.; Globe Liquor Co., Inc., Wilmington, Del.
Shipper Manufacturer—Gonzalo A. Larrea, S de R.L.
(Address)
Mexico, D.F.
Cons. Invoice.....(Place) Mexico (No.) 5872 (Date consulated) 5-23-44.
Steamer—Int. R.R. & P.R.R. (via Laredo)
(Date of entry)
Marks S M 1/750 750 cs.—9,000 bottles. 1800 gals. Value: $8062.50.
Sample taken 7-11-44 (3 bots.)
(Date importer notified) 7-11-44
Entry No. I.T. No. WH-IA (Wilmington)
(Port)
Action..... Detained 7-12-44 .....
(Date)
Place of production—Mexico
(Is dec. of shipper lacking) No
Results of analysis: It is adulterated under Section 402 (a) (1) of the Food, Drug & Cosmetic Act of 1938 since it contains a foreign substance dangerous to health—glass particles.
F.D. 777—Importer—Date of Hearing

15 And afterwards on, to wit, the 5th day of November 1945, came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

16 IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 45 C 120) * *

STIPULATION FOR WAIVING SERVICE OF NOTICE TO PRODUCE ORIGINAL DOCUMENTS.

It Is Hereby Stipulated, by and between the parties hereto, by their respective attorneys, that they hereby waive the service of any notice upon each other for the production by one party of original letters or other documents in the possession of said party, and that the other party may prove the contents of said letters or documents by secondary evidence.

Ben W. Heineman,
Attorney for Plaintiff.

Nat M. Kahn,
Attorney for Defendants.

17 And afterwards, to wit, on the 4th day of January, 1946, being one of the days of the regular December, 1945 term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

18 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 45 C 120) * *

On motion of the defendants by their attorney

It is Ordered that leave be and it is hereby given to the defendants to file an amended answer herein.

19 And on the same day, to wit, the 4th day of January, 1946, came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Amended Answer to Plaintiff's Complaint in words and figures following, to wit:

20 IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 45 C 120) * *

AMENDED ANSWER OF DEFENDANTS TO PLAINTIFF'S COMPLAINT.

1. Defendants admit the allegations contained in paragraph 1 of plaintiff's complaint.

2. In answer to the allegations contained in paragraph 2 of plaintiff's complaint, defendants deny that during March of 1944, or at any other time, did they, as principals, agree to sell to the plaintiff the Mexican Tequila described in plaintiff's complaint. On or about March 16, 1944, the plaintiff orally requested one Gabriel H. Todes, the agent and salesman of the defendants, to place an order through the defendants to purchase from their principal, located in Mexico, 750 cases of Mexican Tequila, more fully described as Mariachi Tequila (Gold). At the time the plaintiff delivered its order, described as Exhibit "A" in its complaint, to said Gabriel H. Todes, the plaintiff and said Gabriel H. Todes, acting as the agent and salesman of the defendants, orally agreed that said order was subject to acceptance and confirmation by the shipper in Mexico; that the defendants, not being in the liquor business or having an importer's license, and not handling said merchandise in any manner, were not to be personally liable for the shipment of said liquor or its
21 quality; that the time of shipment and quality of the merchandise would be the responsibility of the shipper in Mexico and not the defendants; that the plaintiff would deliver to the defendants a letter of credit for 60 days in favor of the defendants or their assigns for the amount of the purchase price of said merchandise; and that the terms or conditions of said letter of credit would be those contained in a form of letter of credit that said Gabriel H. Todes delivered to the plaintiff on or about March 16, 1944.

3. During the entire transaction described in plaintiff's complaint, the defendants were the sub-agents, middlemen or brokers for the shipper of said merchandise, one Gonzalo A. Larrea, of Mexico City, Mexico, in whose behalf the defendants obtained said order, request or offer of the plaintiff to purchase said merchandise. On or about May 12, 1944, the plaintiff was informed by the

defendants that the name of the shipper of said merchandise was said Gonzalo A. Larrea, located in Mexico City, Mexico. On or about May 12, 1944, when the plaintiff was informed by the defendants of the name of said shipper, the said merchandise had not been shipped to the plaintiff and the plaintiff had not incurred any liability of any nature to any person under the terms of the letter of credit described in and attached to plaintiff's complaint as Exhibit "D," nor had the plaintiff incurred any liability of any nature to any person under the original order for said merchandise it had delivered to plaintiff's agent.

4. In answer to the allegations contained in paragraph 3 of plaintiff's complaint, defendants admit that The Chase National Bank, a National Banking Association having its principal place of business in the City of New York, State of New York, issued its letter of credit No. 25668 for Eight Thousand, Sixty-two Dollars and Fifty Cents ($8,062.50). The aforesaid letter of credit was issued pursuant to the understanding between the plaintiff and the defendants that the benefits under said letter of credit would be payable to the defendants or their
22 assigns, and at the time there was a long established and uniform custom then in existence throughout the United States in the sale of said commodity, that the monies due for merchandise exported from a foreign country to a purchaser in the United States would first be paid to or under the control of the broker, agent or middleman who effected said sale, so that the broker, agent or middleman would have aedquate security for the payment of the compensation or brokerage due to the agent, broker or middleman. Said custom was well known by the parties at the time said letter of credit was caused to be issued by the plaintiff, and the parties knew that the proceeds under the letter of credit were made payable to the defendants, or their assigns, so the defendants would have security for the payment of their brokerage or compensation from the said shipper.

5. Defendants deny that payment for the merchandise was made by the plaintiff tothe defendants. Payment thereof was made to The First National Bank of Chicago under the terms of said letter of credit. The shipper of said merchandise, Gonzalo A. Larrea, would not have shipped said merchandise consigned to the plaintiff nor would he have sent to The First National Bank of Chi-

cago, in accordance with the terms of said letter of credit, his commercial invoice, consular invoice, insurance certificate, original bill of lading and other documents designated in said letter of credit, unless the plaintiff, in accordance with the terms of said letter of credit, would have arranged to pay The First National Bank of Chicago for said merchandise so that the latter could remit the proceeds of said payment to or for the account of the shipper, Gonzalo A. Larrea, after first deducting from said payment the compensation or brokerage which the defendants were entitled to retain for said sale under their agreement with Pine Needle de Mexico, the
23 original agent of said shipper.

6. When the plaintiff received the letter of the defendants dated May 22, 1944, identified as Exhibit "E" in plaintiff's complaint, the plaintiffs were then advised that the shipper had accepted the plaintiff's order or offer to purchase said merchandise.

7. Defendants admit the allegations contained in paragraph 4 of plaintiff's complaint.

8. Defendants deny the allegations contained in paragraph 5 of plaintiff's complaint, except that the Federal Security Agency of the Food and Drug Administration issued its notice in writing relative to its inspection and analysis of the shipment of said merchandise and that a copy of said notice is attached to plaintiff's complaint and identified therein as Exhibit "F." Defendants further state that they have been informed by the plaintiff that only 48 bottles out of the shipment of 9,000 bottles of said merchandise were inspected by said Food and Drug Administration Agency and that out of said 48 bottles 3 bottles were examined in a laboratory.

9. In answer to the allegations contained in paragraph 6 of plaintiff's complaint, defendants deny that they were obligated to deliver said Seven Hundred Fifty (750) cases of Mexican Tequila to the plaintiff, but that said obligation was that of the shipper thereof, Gonzalo A. Larrea, of Mexico City, Mexico, for whom the defendants acted as the sub-agents, middlemen or brokers, as set forth heretofore.

10. In answer to the allegations contained in paragraph 7 of plaintiff's complaint, defendants are without knowledge, other than the statements contained in plaintiff's complaint, that the plaintiff incurred expenses described in said paragraph 7 of plaintiff's complaint.

Defendants further state, that if the plaintiff did incur said expenses, they were not incurred through any fault or obligation of the defendants, who acted as the mere sub-agents, brokers or middlemen for the disclosed shipper, Gonzalo A. Larrea, with whom the plaintiff entered into an agreement to purchase said merchandise.

11. The letter of credit procured by the plaintiff and identified as Exhibit "D" in plaintiff's complaint required that before any payment would be made under this letter of credit, the drafts drawn under this letter of credit had to be accompanied by "Mexican Shipper's Commercial Invoice * * * original bill of lading issued to the order of Mexican shipper, blank endorsed," and other documents specified in said letter of credit. Before the plaintiff paid for the merchandise in question, it or its agent was shown said Mexican Shipper's Commercial Invoice for said merchandise and other documents required by said bill of lading, which again disclosed that the name of the shipper and seller of said merchandise was Gonzalo A. Larrea.

12. After the defendants were notified by the plaintiff of the issuance by the Federal Security Agency of the Food and Drug Administration of its certificate of inspection and analysis, which is identified as Exhibit "F" in plaintiff's complaint, the defendants immediately communicated with the shipper of said merchandise, Gonzalo A. Larrea, who, in turn, during July of 1944, notified the plaintiff by telegram that he, the shipper, Gonzalo A. Larrea, would assume the expense of filtering and rebottling the merchandise. A copy of the telegram of said shipper, Gonzalo A. Larrea, to the plaintiff is attached hereto marked Exhibit "A", and by reference thereto is made a part of this answer. The defendants also notified the plaintiff of this offer of filtering and rebottling the merchandise by the shipper, Gonzalo A. Larrea, as evidenced by a letter written by the defendants to the plaintiff, dated July 24, 1944, a copy of which letter is attached hereto marked Exhibit "B", and by reference thereto is made a part of this answer.

13. During June and July of 1944, there occurred a substantial drop in the market of alcoholic beverages, including Mexican Tequila of the kind purchased by the plaintiff, and the defendants are informed and believe,

and on such information and belief so state the fact to be, that the plaintiff refused to accept the offer of the shipper of said merchandise, Gonzalo A. Larrea, of Mexico City, Mexico, to bear the cost of filtering and rebottling said merchandise because of the drop in the market price of alcoholic beverages, including said Mexican Tequila, during July of 1944.

14. Before the defendants received any notice that the said merchandise was claimed to be defective in quality, and immediately after the plaintiff caused payment to be made for said merchandise to The First National Bank of Chicago in accordance with the terms of said letter of credit, the defendants, in turn, caused payment to be made for said merchandise to said Gonzalo A. Larrea, after the defendants deducted and retained from the proceeds of the payment caused to be made by the plaintiff, the compensation or brokerage which the defendants were entitled to retain for said sale under their agreement with said Pine Needle de Mexico.

15. The gross brokerage or compensation that the defendants retained from the sale of said merchandise under its agreement with Pine Needle de Mexico, the general agent of the shipper, was Ten Hundred Twelve Dollars and Fifty Cents ($1012.50). The actual expenses incurred by the defendants in connection with said transaction are the following items:

First National Bank charges	$ 43.81
Commission to G. H. Todes	150.00
Commission to R. Turlan y Cia., S. de R. L.	241.88
Refund to Pine Needle de Mexico, S. de R. L. for insurance and Mexican taxes	63.58
Long distance calls and cable charges (prorated)	59.95
Traveling expenses in connection with two trips by Mr. F. San Roman prior to June 1, 1944 (pro-rated)	111.11
Total	$670.34

A substantial part of the residue of this gross brokerage or compensation was spent by the defendants for traveling and other expenses incurred by the defendant, Frank San Roman, when he traveled to Mexico and endeavored to adjust the claim of the plaintiff against the shipper, Gonzalo A. Larrea.

16. Accordingly, the defendants deny that they are liable to the plaintiff in any sum whatsoever, and they, therefore, request that the plaintiff's complaint be dismissed at its own costs against the defendants.

Frank San Roman and Dorothea San Roman,
doing business under the firm name and
style of International Industries, Defendants,
By *Nat M. Kahn*
Their Attorney.

Nat M. Kahn,
Suite 1757, 33 S. Clark St.,
Chicago 3, Illinois.
Telephone: Central 3053
Attorney for Defendants.

I acknowledge receipt of a copy of the foregoing Amended Answer, this 3rd day of January, A. D. 1946.

Ben W. Heineman,
Attorney for Plaintiff.

27 EXHIBIT "A."

Western Union.

NA260 NL-Mexicocity Via Mextel July 21
1944 Jul 22 PM 4 56

Globe Liquor Co Inc—
18th and Market St Wilmington Del—

International Industries advise 750 cases Tequila shipped you on May 23rd rejected Pure Food Authorities account glass particles stop although cannot understand how this happened in order render merchandise salable under your laws we hereby authorize you to filter and rebottle said 750 cases at our expense—

Gonzalo A Larrea.
750 23 750.

28 EXHIBIT "B."

July 24, 1944.

Air Mail
Globe Liquor Co., Inc.
18th & Market Sts.,
Wilmington, Delaware

Gentlemen:

This will acknowledge receipt of your letter of July 20 with enclosure of photostatic copies of the Pure Food & Drug Authority report on your shipment of 750 cases Mariachi Tequila.—

We have just been advised by our people in Mexico that the shipper, Gonzalo A. Larrea, S. de R. L., who as you know collected the full value of the merchandise as per their invoice rendered to you, is wiring you directly to the effect that they will assume expenses of filtering and rebottling of the shipment.—

Meanwhile, we have also received a letter from the shipper dated July 16 wherein they also state that they would reimburse to you the cost of filtering and rebottling.—

Yours very truly,
International Industries.

F. San Roman's
CC G. H. Todes.

Managing-Director.

29 And afterwards on, to wit, the 8th day of January, 1946 there was filed in the Clerk's office of said Court a certain Deposition of Gabriel H. Todes in words and figures following, to wit:

31 In the District Court of the United States

* * (Caption—No. 45 C 120) * *

The deposition of Mr. Gabriel H. Todes, taken on behalf of Defendants, in the above entitled case, before Harry Michaelson, a Notary Public of Cook County, Illinois, on the 24th day of December, A. D. 1945, at Suite 1757, No. 33 South Clark Street, Chicago, Illinois, pursuant to notice hereto annexed.

Present:

Mr. Ben W. Heineman,
on behalf of Plaintiff.

Mr. Nat M. Kahn,
on behalf of Defendants.

Mr. Kahn: Do you want to waive the signature?

Mr. Heineman: As far as I am concerned, I will waive it, subject to check as to accuracy.

GABRIEL H. TODES, being first duly sworn by the Notary to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, was examined and testified as follows:

Direct Examination by Mr. Kahn.

Q. State your name, please. A. Gabriel H. Todes.

Q. Where do you live, Mr. Todes? A. Syracuse, New York.

Q. How long have you lived there? A. Since November 1, 1944.

Q. Prior to that where did you live? A. Baltimore, Maryland.

Q. Will you give us the address where you reside in Syracuse? A. My home or business?

Q. Home. A. 600 James Street.

Q. And your business address? A. 415 Chimes
33 Building.

Q. What is your present business or occupation?

A. I am the district manager for Schenley Distributors Corporation, for all of New York State with the exception of Metropolitan, New York; that is, from Westchester County, through Buffalo.

Q. How long have you been employed in that capacity?

A. Since November 1, 1944.

Q. Prior to that time what was your business or occupation? A. I was the district manager for the Mid-Atlantic District, which comprised Delaware, Maryland and the District of Columbia.

Q. What is the business of Schenley Distributors?

A. Distilling spirits of all types; that is, whiskey, gins, wines.

Q. How long have you been in the liquor business? generally? A. Since August, 1933; just prior to repeal.

Q. The repeal of the 18th Amendment? A. That is right.

Q. State in general the nature of your business since repeal. A. Up to the time I was with Schenley?

34 Q. Yes.

A. I was in the brokerage business; whiskey brokerage business; case goods and bulk whiskey, doing business with wholesalers and rectifiers.

Q. Where was your place of business during that period? A. 410 South Michigan Avenue.

Q. Through what part of the United States have you traveled since you have been in the liquor business, as a broker or salesman? A. Well, I have covered practically all of the United States except the Western Coast; that is, California, Washington, New Mexico, Montana, and that part west of the Rockies.

Q. Since you have been in the whiskey business or liquor business, have you handled, would you say, thousands of separate sales of liquor? A. Oh, yes.

Q. Of all kinds? A. Oh, yes.

Q. Through wholesalers? A. To wholesalers and to rectifiers.

Q. Distributors? A. Well, wholesalers are distributors.

Q. Retailers? A. Well, I do very little selling to retailers. Our business is primarily with the larger

35 user.

Q. When did you first become acquainted with Frank San Roman, one of the partners of International Industries, located at 600 South Michigan Avenue?

A. I would say it was either the latter part of 1943 or the early part of 1944.

Q. Did you make an arrangement with him to act as a salesman for his firm? A. Yes, I got in touch with Mr. Roman and wrote him a letter asking him if he had any connection whatsoever where he could get merchandise from Mexico to sell in the United States.

Q. Do you recall when that was? A. It was in the very early part of 1944. I called him on the 'phone first and then I wrote him a letter.

Q. When did you first start selling merchandise as a salesman for International Industries? A. In January, 1944.

Q. You made some sales, did you? A. I made quite a number of sales.

Q. What commodity did you sell? A. I sold Tequila.

Q. Mexican Tequila? A. Mexican Tequila.

Q. What other commodity? A. Gin. That came
36 from Argentine, and some of it came from Mexico. I sold thousands of cases of the Tequila.

Q. Mr. Frank San Roman is the only member of the defendant firm that you dealt with? A. Yes.

Q. What were his oral instructions to you relative to the taking of orders or selling of merchandise in his behalf?

Mr. Heineman: That is objected to. The oral intructions of the defendant to the salesman has no bearing.

M. Kahn: Only to show his apparent authority or real authority.

Mr. Heineman: Objected to.

Mr. Kahn: I will withdraw it for the moment.

Q. Where and when did you receive your intructions from Mr. Frank San Roman relative to the sale of Tequila or other liquor?

Mr. Kahn: Strike that.

Q. Where and when did you receive your instructions from Mr. Frank San Roman as to the taking of orders for the sale of Tequila or other liquor?

Mr. Heineman: Objected to on the same ground.

37 Mr. Kahn: I suggest that you answer subject to the objection of counsel.

The Witness: A. Well, I received from Mr. San Roman of International Industries—

Mr. Kahn: The question is where and when.

A. Through the mail and by long-distance 'phone; what he was able to get from the various distillers in Mexico to offer for sale.

Q. When was that; early part of 1944? A. It was in the early part of 1944.

Q. What did he tell you?

Mr. Heineman: That is objected to on several grounds; one, that it is not binding on the plaintiff; two, that since the communications were written the letter should be produced. The testimony as to what was contained in said communications is not the best evidence.

Mr. Kahn: I think the point is well taken.

Q. Do you have Mr. San Roman's original letter to you with you? A. No, I do not have it with me.

Q. Did you have any conversation with him relative to your method of taking orders? A. Yes, I did.

Q. Where did that conversation take place?

38 A. Over the telephone.

Q. When? A. Long-distance 'phone.

Q. When? A. In the early part of January or early part of 1944, when I first got the list of what merchandise I could offer for sale.

Q. Had you ever spoken to him prior to that, on the long-distance telephone? A. Yes, I had.

Q. Did you recognize his voice on this particular occasion? A. Yes, I did.

Q. What did he say relative to your method of taking orders in his behalf?

Mr. Heineman: That is objected to on the ground that any conversation between the defendant and Mr. Todes is not binding upon the plaintiff or related to the issues in this case; and, secondly, on the ground that since those instructions were reducted to writing, oral conversations with respect to that are not the best evidence.

Mr. Kahn: The purpose of the question is to show the actual authority of the witness and for no other pur-

39 pose.

I suggest you answer the question subject to counsel's objection.

The Witness: A. My instructions were—

Mr. Kahn: Q. Just repeat what Mr. San Roman told you on the telephone. A. Mr. San Roman told me that I might offer this merchandise subject to acceptance and confirmation by the shipper in Mexico and subject to the prices as given me.

Q. What else did he tell you? A. Well, he told me that he was not in the liquor business, which I knew from my first conversation with him, and that at no time would he ever be responsible for any shipments. He couldn't guarantee the shipments or delivery of the merchandise because that was the responsibility of the shipper in Mexico.

Mr. Heineman: Is it understood that my objection stands to this entire line of examination?

Mr. Kahn: That is right.

Q. Go ahead. A. He said, "I don't know anything about the liquor business and will have to be guided by you because you have experience and you can direct me what the trade needs, and I will go down to Mexico, or I

will 'phone them or write them and try to get what you think you can sell."

40 Q. Do you recall whether he told you anything else? A. I asked him how this merchandise was going to be paid and he said, "Paid by a letter of credit made payable to International Industries or assigns, in a bank in the United States. The merchandise will be C. I. F. Laredo, Texas."

I said, "I don't want to handle any of the finances of the thing. I will simply get the orders and you tell me how to make out the letter of credit or send me a sample copy, and I will turn it over to the accounts to whom I sell and they will follow that form and then you can communicate directly with them and carry it through."

Well, my understanding of the thing was that the reason this was done was so the letter of credit would not have to be sent to the distiller or manufacturer or the shipper in Mexico, and that the funds would be in the United States.

Q. Is that what Mr. San Roman told you?

A. That was my understanding.

Q. Is that what he told you during that conversation?

A. Yes, I think that is what he did.

41 Q. Is there anything else you recall during that conversation that you have not given? A. No, I can not, for the moment.

Q. Well, to refresh your recollection, did he say anything about the responsibility of his firm for quality?

A. Well, he told me he was not responsible; that all he was going to act was as financial broker in the matter; that is, handling the letters of credit.

Q. Mr. Todes, this case is set for trial January 7, 1946, in the United States District Court here at Chicago. Is it possible for you to arrange to be personally present and testify as a witness in this case at that time?

A. That is very difficult for me to make a statement. I work for Schenley Distributors. I never know what they have in mind for me to do.

Q. Could you bind yourself now to be definitely here when the case is tried? A. No, I couldn't do it.

Q. And it is as a convenience to you that this deposition is being taken now? A. Yes.

Q. And you made the request? A. I asked you to

42 do that.

Q. During March of 1944 did you call on the Globe

Liquor Company? A. Yes, I did.

Q. And where is their office located? A. Their office is in Wilmington, Delaware.

Q. Who did you talk to there? A. Mr. Morton Lazarus.

Q. At that time what was his position with the Globe Liquor Company, if you know? A. I don't know whether —he is vice-president, and Mr. Wolf is president, although I think Mr. Lazarus is the actual owner of the business. In the State of Delaware you must be a resident of the state—

Mr. Heineman: I object to that.

Mr. Kahn: That may be stricken.

Mr. Heineman: I move to strike out the last, about what he thinks.

The Witness: I have never asked him, "Do you own the business?"

Mr. Kahn: Q. How long prior to this call in March of 1944 had you known Mr. Lazarus? A. Oh I would say I have known Mr. Lazarus for five years.

43 Q. Had you had any prior business dealings with him? A. No, I had not.

Q. Had you ever attempted to sell him any whiskey? A. No, I had not.

Q. You had no business dealings with his firm? A. No.

Q. I direct your attention to a statement in an affidavit that you supplied for the defendants, where you said, "I have known Mr. Lazarus for at least five years, and I had business dealings with him."

A. Well, I sold him probably a week before some Vermouth, for a concern in New York.

Q. Had you ever sold him anything previous to that? A. Nothing prior to that.

Q. Had you ever called on him prior to that? A. No, never called on him in a business way.

Q. How did you get to know him? A. That is a very difficult thing for me to answer, how I get to know people. I was introduced to him. I know a lot of people in Baltimore. That was my home. I was born and raised there. He is a very good friend of Lee Eisman, who is a very good friend of mine; and I think Lee Eisman suggested that I call Mort on the telephone and see him. And I

44 know his son-in-law, Stewart Fischler, very well, who who is an employee of one of Schenley Distributors' affiliates, and who was in the same office with me in Baltimore, Maryland.

Q. Mr. Todes, did you talk or deal with any other person than Globe Liquor Company relative to this transaction? A. I dealt directly with Mr. Lazarus, who also discussed it with Mr. Wolf.

Q. In your presence? A. When I sold Mr. Lazarus he and I were alone.

Q. Coming down to that, do you recall the date that occurred; when you took an order from Mr. Lazarus?

A. During March, in the 20's sometime, I think. I don't know.

Q. To refresh your recollection as to the exact date that you called on Mr. Lazarus and took this order, I show you a photostatic copy of a purported order that you took. A. That is March 16th.

Q. Does that refresh your recollection as to the date?

A. Naturally, if that is on there, that is the date.

45 I thought it was somewhere around the 20th of the month. It is the 16th.

Q. Where did you talk to Mr. Lazarus? A. In Mr. Lazarus' office.

Q. Just the two of you were there? A. He and I.

Q. What did you say to him, stating your own words, and what did he say to you?

Mr. Heineman: That is objected to on the ground that there is a written agreement between the plaintiff and defendant, and that any oral testimony seeking to vary the terms of that agreement is incompetent and a violation of the parol evidence rule.

Mr. Kahn: I suggest that you answer subject to counsel's objection.

Mr. Heineman: It is understood that my objection stands to the entire conversation between Mr. Todes and Mr. Lazarus?

Mr. Kahn: That is right.

The Witness: You want to know how I obtained the order and what our conversation consisted of; is that it?

Mr. Kahn: That is right.

The Witness: Before I went over or after I was there?

46 Mr. Kahn: Both.

A. I called Mort on the 'phone and I said, "Mort, I have some"—

Mr. Kahn: Q. On what date? A. On the same day.

I was in Wilmington, Delaware, calling on one of my wholesalers. I called Mr. Lazarus on the 'phone and I said, "Mort, I have some things that I think you can use."

Whiskey was very scarce at the time and the wholesalers were trying to get everything they possibly could.

Q. Is that part of your conversation?

A. Well, I am explaining why—

Q. You are only restricted to what you said and what he said. A. All right. I said, "Mort, I have some things for sale", and I named what they were—"and I would like to come over and see you."

He said, "All right, Gay. Come over."

Q. What did you name?

Mr. Heineman: If anything, over the telephone?

The Witness: A. Yes, I did. I named first some lower priced items in Vermouth and wines. I named gin,
47 and I named Tequila and Vodka.

He said, "All right, Gay. Come over."

I made an appointment for later in the afternoon, and I went over there and I walked into his office, and he and I sat down and we discussed generalities first.

I said, "Mort, I think you can use this Tequila. Lee Eisman has bought 750 cases."

I said, "Primarily the shipper in Mexico will not accept less than a 1500 case car, but I am permitted to sell 750 cases to two accounts, so that they can pool the car and ship it up here. Lee bought 750 cases. If you will take 750 cases you can ship it together."

He said, "Who is International Industries?"

I said, "Well, they are not in the liquor business. They don't know anything about the liquor business and they are not responsible for any shipments or the quality of the merchandise or anything about it. They have made connections in Mexico to get these various items. I am the only one who is selling for them, I think. And Mr. San Roman, who is the owner of International Industries, is guided solely by me."

48 Mr. Lazarus said, "O. K., Gay. How much is it?"

I told him the price, and he said—this was white Tequila.

He said, "I think if I can get it in gold, the colored people would think it was Mexican whiskey and it would sell much more readily."

I said, "Well, I don't know what the price is. I have

no listing on any gold, but I will contact International Industries and see if they can give me some information."

He said, "Well, how soon will it be shipped?"

I said, "I can't tell you that either, but you have to pay for it in a 60-day letter of credit; a letter of credit to be made like this"—and I handed him the sample that I had of the letter of credit. It was payable to International Industries or assigns, C. I. F. Laredo, Texas.

I said, "You see, Mort, you don't have to send your letter of credit down to Mexico; it will be payable here in a bank in the United States, when the goods reaches Laredo, Texas."

So he made out this order on one of his little books. This is not my writing.

Mr. Heineman: By "this", what are you referring
49 to?

Mr. Kahn: To the photostatic copy.

The Witness: This is not my writing.

Mr. Heineman: Let us get it in the record.

Mr. Kahn: That photostatic copy?

The Witness: That photostatic copy is not my writing.

Mr. Kahn: Q. Is your signature on there?

A. He wrote that, because he spelled my name "G-a-b-r-i-a-e-l", and I don't write it that way.

Q. Is your handwriting on that document which is represented by a photostatic copy?

A. The only thing on there of mine is this import license number. That is my handwriting.

Q. Your signature is not on there? A. My signature is not on there.

Q. What else did you tell him or what did he say to you during that conversation? A. He wanted to know again when he would get the merchandise.

Q. Did he say why? A. Yes, he did.

Q. What reason did he give?

A. Well, he said, "I would like to get the merchandise in as fast as possible because I think I can sell it
50 now."

Q. Is there anything else that was said during that conversation that you have not given?

A. I think I have about covered it.

Q. Is your recollection exhausted? A. Yes.

Q. To refresh your recollection, did you say anything about whether International Industries were im-

porters of liquor? A. Well, I mentioned before that they—that I told him that they had nothing to do with the liquor business; they were not in the liquor business and knew nothing about it.

Q. Did you tell him whether they had an importer's license? A. They had no license.

Q. Did you tell him that? A. I told him they had nothing to do with the liquor business; they were not in the liquor business, and if they are not in the liquor business they couldn't have an importer's license or any other kind of a license.

Q. To refresh your recollection further, did you say anything to Mr. Lazarus about whether International
51 Industries handled this merchandise or had possession of it in any way? A. I told him it was to be shipped from Mexico.

Q. Directly from Mexico? A. Directly from Mexico.

Q. To refresh your recollection further, during that conversation did you say anything about the orders that you took being subject to confirmation by anybody?

A. I told every account to whom I sold, as well as to Mr. Lazarus, that all orders were subject to acceptance and confirmation by the shipper.

Q. Which was located where? A. In Mexico. And every one of the samples of the letters of credit stated that in there; and when I gave it to him and when he read it, naturally, he saw that.

Mr. Heineman: That is objected to as a conclusion of the witness, as to what he saw.

Mr. Kahn: Q. But you gave it to him to read?

A. Yes.

Q. And did he read it in your presence?

A. Well, he looked at it. Whether he read it or not, I couldn't tell you, but he looked at it.

52 Q. Did he ask any questions about it? A. No.

Q. To refresh your recollection further, do you recall the language you used to explain to Mr. Lazarus the position of International Industries in this transaction? What term did you use, if any? A. I said they were financial brokers in it.

Q. Did you explain what you meant by that?

A. Yes, I think I did.

Q. What was your explanation? A. I told them that that made it easier for him, for the payment of his money; that it was safer. In other words, he don't have

to send a letter of credit down to the distiller or the shipper in Mexico. By making it payable to International Industries or assigns, it would be paid in a bank in the United States, and that Lee Eisman had told me he had looked up Mr. San Roman and got a very fine recommendation from the First National Bank in Chicago.

Q. Mr. Todes, did you have any conversation with Mr. Lazarus that day relative to the payment by his firm to you of a separate brokerage or commission?

A. Yes. I said, "Mort, it will cost you a dollar a case as commission to me."

53 He said, "Oh, that's all right. I don't care."

Q. Was there anything further you said about that? A. Payable upon receipt of the merchandise.

Q. Is there anything further that you said about the payment about this separate brokerage to you by the Globe Liquor Company, that you have not given?

A. I don't recall.

Q. To refresh your recollection further, about this conversation of March 16, 1944, with Mr. Lazarus, was anything said about the difficulty of purchasing alcoholic beverages in the United States at that time? A. We discussed it in general.

Q. What did he say and what did you say?

A. Well, that is very difficult for me to say, what did I say and what did he say. We discussed the liquor situation, as it pertained to the American distillers. No one knew how long the war was going to last. The distillers were not manufacturing whiskey. We didn't know how long the supply would last; whether the distillers would be allocated more stringently than they were doing at the time, and just how long the situation would

54 exist, or if it would continue in such a way that after a while there would be practically no shipments of whiskey to any wholesalers whatsoever, and that they would have to try to get whatever they could from out of the country; any types of merchandise.

Q. From your knowledge of the trade conditions at that time, during March of 1944, and specifically March 16th, 1944, was merchandise plentiful?

A. What kind of merchandise?

Q. Were alcoholic beverages plentiful at that time?

A. Do you mean American?

Q. Both American and imported? A. Well, American merchandise was not plentiful at all. There were a

lot of imports offered for sale from Argentine, from Chili, from Spain and from Mexico.

Mr. Heineman: I am sorry.

Has Mr. Todes left his conversation with Mr. Lazarus?

Mr. Kahn: Yes, for the moment.

Mr. Heineman: Go ahead. I want to make an objection pertaining to that answer. Let him finish first.

Mr. Kahn: Go ahead.

The Witness: A. That merchandise was more in
55 evidence and being offered more freely, but American goods, you couldn't get it.

Mr. Heineman: I ask that the answer be stricken and objection is made to the answer upon the grounds that the state of the liquor business at the time of the purchase and sale here involved is immaterial to the issues in this case.

Mr. Kahn: Q. Mr. Todes, directing your attention further to this conversation you had with Mr. Lazarus on March 16, 1944, do you recall whether you discussed the scarcity of alcoholic beverages in the market at that time? A. We discussed the situation in general.

Q. Would you please state your best recollection of what you said and what he said?

Mr. Heineman: Same objection to the conversation as made to the last question and answer and also renewing my objection to any answers with respect to the conversations between Mr. Todes and Mr. Lazarus.

Mr. Kahn: I suggest that you answer subject to the objection.

The Witness: Well, I simply repeat what I said
56 before.

Mr. Kahn: Q. Just restate it in the way of a conversation that occurred between the two of you.

A. He asked me what I thought about general conditions. I said, "Mort, it is hard to tell."

Mr. Kahn: It is not necessary to repeat.

Q. I am asking you specifically, to refresh your recollection, as to whether there was any discussion between the two of you as to the scarcity of liquor in the market at that time? A. Yes. He asked me if we were shipping at that time; meaning Schenley Distillers.

Q. What did you say? A. And I said allocations were cut to the bone.

Q. What else was said? A. I asked him how the

firms whose brands he was handling are shipping, and he said, "We are not getting very much." And I don't remember verbatim what we discussed. We discussed it in general.

Whiskey was scarce at the time. American whiskey was very scarce at the time.

Mr. Heineman: Are you testifying to a conversation now or what you believe the facts to be?

The Witness: Well, I know what the facts were.

57 Mr. Kahn: Counsel is asking you are you talking about conversations. That is all I am asking you to give.

Q. Did you talk about the scarcity of liquor at that time? A. Well, we discussed the scarcity of whiskey, but just what the conversation, about who it was, and things in particular, I don't recall.

Q. I want you to give us your best recollection, that's all.

Now, when did you next talk to Mr. Lazarus about this transaction?

A. I wrote Mr. San Roman about the gold Tequila. He told me that he had contacted the shipper in Mexico, and that it would be 25 cents more a case than the price stated for the white Tequila.

Mr. Heineman: That is objected to. That is not the best evidence of what he wrote.

Mr. Kahn: That may be stricken.

Q. After the arrangements were made between you and Mr. Lazarus to pay the 25 cents additional price per case for the gold Tequila, when did you next talk to Mr. Larzarus? A. Why, I talked to him two or three

58 times. I don't know the dates.

Q. Relative to this transaction? A. I don't think I talked to him relative to the transaction until after he had sent me a check for the commissions, and then he either called me—he called me on the 'phone, I think, and told me that the Pure Food and Drugs had condemned the shipment that had arrived.

Q. That was during July of 1944? A. I think so.

Q. All right. Where did he call you, long-distance?

A. I don't know whether he called me from Wilmington. He lived in Baltimore. I don't know whether he called me from Wilmington or whether he called me from his home.

Q. But you did recognize his voice coming over the 'phone? A. Yes.

Q. What did you tell him after he told you that the Tequila was being held up by the Federal Food and Drug Administration? A. Well, I told him that I felt very badly about it, but, after all, neither I nor Mr. San Roman or the International Industries were responsible for the condition of the merchandise or the shipment of
59 the merchandise or the quality of the merchandise; that that was the sole obligation of the shipper. And I suggested that he contact the shipper in Mexico. And it is then that he said to me, "We want our money back."

And then is when I told him that neither Mr. San Roman, the International or I was responsible for the condition of the merchandise or the quality of it or the shipment of it; that the obligation was the sole responsibility of the shipper, and I suggested that he contact the American Consul in Mexico and go after the shipper for reimbursement.

Mr. Heineman: That answer is objected to, and I ask that it be stricken on the ground that any discussions after the material was condemned are irrelevant to the issues in this case, and certainly Mr. Todes' statement with respect to the legal liabilities or responsibilities of the parties is of no relevancy.

Mr. Kahn: Q. What did Mr. Lazarus say in response to that statement? A. Well, he said, "I agree that"—

Mr. Heineman: That is objected to on the same
60 ground.

Mr. Kahn: You may note the objection.

Q. Go ahead and give the conversation of Mr. Lazarus.

A. He said, "I agree that the shipper is responsible for it." He said, "We want our money back." He said, "I am not saying that it is your fault but it is the shipper's fault."

Q. Did you talk to him again about the refiltering or rebottling of the merchandise? A. Yes, I talked to him about refiltering the merchandise.

Q. Was that over the telephone or in person?

A. Over the telephone.

Q. How many days after the last conversation you have just given? A. I couldn't state. It may have been three or four days, or it may have been a week.

Q. Did he call you or did you call him? A. I don't recall that either.

Q. Do you remember recognizing his voice over the telephone? A. Yes.

Q. Will you state what you said to him and what he said to you? A. I said, "Mort, why don't you have
61 this refiltered?"

Mr. Heineman: That is objected to, and the whole conversation is objected to for the same reasons as heretofore given.

Mr. Kahn: Q. And rebottled?

The Witness: Shall I continue?

Mr. Kahn: Go ahead.

The Witness: A. "Why don't you have it refiltered and rebottled?"

I think in between that time I had received a 'phone call from Mr. San Roman, telling me that the shipper had agreed to pay all charges or costs of refiltering and rebottling the merchandise. And I told him that the shipper would pay for that.

And he said, "No, I can't do that." He said, "In the first place, I can't get anybody to do it, and, in the second place, it will take too long and I won't be able to sell the goods."

Mr. Kahn: Q. What else did he say, or what else did you say? A. Well, I told him he was making a mistake. He said he was going to—I don't know whether he said that or not.

62 Q. Did you return the $750 brokerage to the Globe? A. Yes, I did.

Q. Did he ask you to return it? A. I had a letter from him and I sent him my check.

Q. And you complied? A. Yes.

Q. Now, is there anything further that you recall about the last conversation over the 'phone you had with Mr. Lazarus, that you haven't given? A. Well, I don't know whether it was in that conversation or the next, but he said he was going to sue International Industries for the amount of moneys, and I said, "You will be making a mistake, Mort, because you can't collect from them. Neither they nor I are responsible for the shipment of this merchandise."

Mr. Heineman: That is objected to and I ask that the answer be stricken.

Mr. Kahn: Q. Did you say anything about cooperating with his firm? A. I told him that my—

Mr. Heineman: That is objected to. Just a moment, please, until I make my objection.

63 The Witness: Yes, sir, I am sorry.

Mr. Heineman: That is objected to on the ground that it is irrelevant to the issues in this case.

Mr. Kahn: Go ahead.

Q. Did you say anything about cooperating with the Globe Liquor Company? A. I told him Mr. San Roman and I would do everything we possibly could to help straighten this matter, and we would cooperate as much as we could.

Q. In an action against the shipper? A. Yes.

Q. Did you use that language? A. In all respects.

Q. Did you say anything about cooperating with the Globe Liquor Company in their claim against the shipper? A. To help get the money from the shipper.

Q. Are you familiar with the custom and practices generally prevailing in the sale of alcoholic beverages to distributors of the United States during March of 1944? A. Yes, I was familiar. I don't set myself up as a criterion or the last word in it, but the general practices that the brokers had.

64 Have you an opinion, that you can state with reasonable certainty, as to the existence of any trade custom or practice in the liquor business whereby the purchase price in payment of the shipment of liquor from a foreign country to a buyer in the United States would be controlled by the broker, the financial broker, here in the United States?

Mr. Heineman: That is objected to as irrelevant to any issues here. The issue here is not what the trade custom is but what was the actual transaction between the parties.

Mr. Kahn: You answer is yes or no.

Q. Have you an opinion as to the existence of any such custom? A. Yes.

Q. To what extent was this custom generally followed in the liquor business?

Mr. Heineman: Same objection, for the same reason.

Mr. Kahn: You may answer, subject to the objection.

The Witness: A. Well, many brokers who did business with foreign distillers collected the money from the consignees so as to protect any commissions that they might get out of the transaction. I don't say that every one did that.

65 Q. Have you an opinion that you can state with reasonable certainty as to the existence of any trade custom or practice in the sale of liquor to distributors in the United States, during March of 1944, whereby the brokers would perform all necessary acts to insure, as much as a broker could, the delivery of merchandise to the buyer?

Mr. Heineman: That is objected to on several grounds. It is objected to on the ground that it is irrelevant in that any custom and trade usages are irrelevant to the issues in this case, and the phraseology of the question is objected to in that it is stated in terms of brokers doing as much as they could, which is an unascertainable fact.

Mr. Kahn: Well, I will rephrase the question.

Q. Have you an opinion that you can say with reasonable certainty as to the existence of any trade custom or practice relative to the sale of liquor to buyers in the United States, during March of 1944, whereby a broker handling a sale would continue to perform services relative to the sale up to and including the time of the delivery of the merchandise to the buyer?

Mr. Heineman: The question is whether he has an

66 opinion?

Mr. Kahn: Yes.

The Witness: A. Yes.

Do you want to know the opinion?

Mr. Kahn: Q. If there is such a custom.

Mr. Heineman: Are you asking him what that opinion is?

Mr. Kahn: Yes.

Q. What is that custom; trade custom or practice?

Mr. Heineman: That is objected to on the ground that it is irrelevant to any of the issues in this case.

The Witness: A. It is always customary, when any broker takes an order from any account, to follow through on that order, particularly if he wants to sell the account again, to see that shipments—and he has no control over shipments—all he can do is to keep after the shipper to be prompt in delivery.

Mr. Kahn: Q. With reference to the payment of the brokerage compensation, do you want to add to your opinion as to the existence of any custom?

Mr. Heineman: That is objected to on the same ground.

The Witness: A. Well, it is not a general practice. Everyone does not handle it in the same way.

67 There are many brokers who require a deposit in advance, particularly in those days where they wanted a guarantee to themselves that the merchandise would be accepted. They took a deposit on that merchandise because a lot of the distillers—

Mr. Kahn: The point I am trying to ask is this.

Mr. Heineman: May I interrupt a minute, please?

Mr. Kahn: Yes.

Mr. Heineman: The entire line of questioning is objected to, and I now move that the answers be stricken upon the additional ground that from the answers of the witness it is apparent that there is no such custom and usage, and that there is no general practice.

Mr. Kahn: Q. I am asking you about the existence of a general trade custom and practice as to when the brokerage commission would be paid; due and payable to the broker.

Mr. Heineman: Objected to for all of the reasons heretofore stated with respect to this line of questions.

Mr. Kahn: Q. Under the prevailing trade custom and practice would the brokerage be payable when the

68 order is accepted, or under what circumstances?

Mr. Heineman: Objected to for the same grounds heretofore stated.

Mr. Kahn: Q. When is the brokerage payable?

A. When the merchandise is received.

By whom? A. By the consignee.

Q. Did you ever talk to Mr. Albert Young, one of the attorneys for Globe Liquor Company? A. Yes, I did.

Q. Did Mr. Young request you to appear as a witness in this case? A. He asked me if I could come.

Q. When did he make that request? A. When I was in his office.

Q. How long ago? A. Oh, I think it was in November.

Q. Of this year? A. Yes.

Q. What did you tell him? A. He wanted me to come out on the 16th of November, I think it was. I said I thought I might be at Chicago for the American Legion Convention. He said, "That will be fine if you can be

there."

68A I said, "I can't state positively that I will be there because I never know what is coming up in my line of duty."

Q. Did he make any further request for you to be here during January of 1946? A. No.

Q. Where did this conversation occur; in what city?

A. In Wilmington.

Q. Wilmington, Delaware? A. Yes.

Q. Did International Industries know that you were getting a separate commission from the Globe Liquor Company? A. Yes.

Q. And did they make objection to that? A. No.

Q. You also received a brokerage commission from International Industries on the same transaction?

A. Yes. May I explain something?

Q. You may. A. The brokerage that I received from International Industries was 25 cents a case, and I wouldn't even handle it for that little.

69 And I told Mr. San Roman that I would collect my brokerage from the buyer; and in those days it was known as a finder's commission. That was a term that was used during the tough times when whiskey was scarce.

Mr. Kahn: Cross examine.

Mr. Heneman: Any cross examination conducted by me, as attorney for the plaintiff, with respect to any matters to which I have heretofore objected, is subject to all of those objections.

Cross Examination by Mr. Heineman.

Q. You say that you wrote the defendant, San Roman, a letter asking him whether he had Mexican connections, prior to your becoming salesman for International Industries? A. Yes.

Q. What led you to write him such a letter?

A. Several things. One is that I knew that Mr. San Roman had been doing business in Mexico on other products. And I knew, from the general conditions in the trade, that merchandise, alcoholic merchandise, was coming from Mexico, and I thought perhaps he, doing

70 business in Mexico, on the various—I don't know whether it is food or drug or chemicals—that he might make connections down there, to get representation in the United States.

Q. When you say Mr San Roman was doing business on other products, do you mean he was importing other products from Mexico? A. I don't know whether he was importing or exporting, but I knew he was doing business in Mexico.

Q. You don't know what the character of his business was; whether he was an importer or an exporter?

A. At first?

Q. At the time you showed him a letter?

A. No. I knew he was doing business in Mexico.

Q. You didn't know whether he was an importer or exporter? A. No, sir.

Q. Directing your attention to your call on the Globe Liquor Company in March of 1944, on March 16, 1944, to be specific, at any time in the course of your conversation with Mr. Lazarus, did you mention the name of the shipper from Mexico who was to ship the Tequila which the Globe Liquor Company bought? A. No, I did not.

71 Q. As a matter of fact, at that time you, yourself, did not know the name of the shipper; is that correct?

A. No, I did not.

Q. Pardon? A. I did not.

Q. You did not know the name of the shipper? A. No. I had the label and the label had Francisco S. Rubio on there, and I never noticed whether he was the shipper or whether he was the distiller, so when I say I didn't know, I might have had the information, but I at least didn't know.

Q. Did you show that label to Mr. Lazarus at the time?

A. Yes.

Q. And at no time in the course of that conversation did you mention the name of Gonzalo T. Larrea? A. No.

Q. You at no time mentioned that name? A. No, I did not.

Q. As a matter of fact, you didn't know that that was the alleged shipper? A. That is right.

Q. Did you ever mention that name as the shipper

72 to Mr. Lazarus? A. No, I did not.

Q. At no time in any of the conversations that you have described, did you mention that Gonzalo A. Larrea was the shipper? A. No, sir, I did not.

Mr. Heineman: May it be stipulated that a true copy of the order dated March 16, 1944, with respect to which Mr. Todes has testified on direct examination, is attached to the complaint in this matter as Exhibit A?

Mr. Kahn: Yes.

Mr. Heineman: Q. Directing your attention to the order dated March 16, 1944, that was written by Mr. Lazarus? A. Yes, sir.

Q. That is in his handwriting? A. Yes, sir.

Q. With the exception of the— A. Import license number.

Q. With the exception of the words "Import license 1-14.08", which is your handwriting? A. That's right.

Q. That was written by Mr. Lazarus, was it not, 73 at your dictation? That is to say, you told him what to write on that order? A. Well, he asked me—he put down the quantity and he put down the size. I had told him the price. I told him it is C. I. F. Laredo, Texas, and the 60-day letter of credit.

Q. And you had also told him, had you not, to write "International Industries" at the top? A. That's right.

Q. And their address, "600 South Michigan Avenue, Chicago"? A. I told him that the order would be sent to International Industries.

Q. And did you also tell him to write this at the top of the order? A. Well, I didn't tell him to write it at the top. It was his order blank, and that is the way he writes his orders.

Q. Now, how many copies of that order were made?

A. I wouldn't know. He gave me that one.

Q. And you took that one with you? A. Yes, sir.

Q. What did you do with the order? A. I mailed 74 it to Mr. Sam Roman of the International Industries.

Q. Did you accompany that order with a letter?

A. I think I did. I think I requested in that letter that Mr. Lazarus wanted it in gold, if he could get it.

Mr. Heineman: Mr. Kahn, will you produce the copy of the letter?

Mr. Kahn: If I have it. Do you want to wait, and I will see if I can find it?

Mr. Heineman: You don't have to produce it now.

Mr. Kahn: Well, I don't know whether I have it or not. I will look fr it.

The Witness: Because I think Mr. Sam Roman wrote to Mr. Lazarus direct regarding it. I remember, I think, receiving a copy where Mr. Sam Roman wrote to Mr. Lazarus direct.

Mr. Kahn: I will make a note of it and look for it.

Mr. Heineman: All right. I assume, if you find it, we can agree on its authenticity?

Mr. Kahn: Yes.

Mr. Heineman: Q. Now I show you a letter dated March 24, 1944, that is attached to the complaint as
75 Exhibit B, and ask you whether that is a correct copy of a letter written by you to Mr. Lazarus on that date? A. Well, that is very difficult for me to say it is exactly the copy because I do not have the original, and I couldn't recall every word that I might have written on the original letter.

Q. Well, I will show you a photostatic copy of the original? A. I would say it is then.

Q. I show you a letter dated March 27, 1944, attached to the complaint as Exhibit C, and ask you whether that is a correct copy of a letter of that date, written to you by the Globe Liquor Co., Inc., signed by Mr. Morton Lazarus, vice-president?

Mr. Kahn: What is the date of that?

Mr. Heineman: The 27th.

The Witness: A. Yes.

Mr. Heineman: Q. You testified that in the course of that conversation you advised Mr. Lazarus that the International Industries were not responsible for the quality of the merchandise?

A. As part of many things that I told him. I said, "They have nothing to do with the shipment of the
76 merchandise. They are simply financial brokers. They are not responsible for the shipment or the quality or anything about the merchandise."

He asked me who they were, and that is how it came up.

Q. Ordinarily when a man buys liquor, through a broker, unless it is a standard branded item, he knows who the seller is, doesn't he? He knows who the manufacturer of the merchandise is, or distiller or rectifier, as the case may be? A. I would say so.

Q. In the course of your conversations with Mr. Lazarus; that is to say your conversations of March 16, 1944, you referred to the fine report that a Mr. Lee Eisman had obtained upon Mr. San Roman from the First National Bank? A. That is what Mr. Roman told me.

Q. And you also told that to Mr. Lazarus? A. And I also told that to Mr. Lazarus.

Q. At the time? A. That's right.

Q. Now, Mr. Lazarus knew Mr. Eisman, did he not? A. They were friends.

Q. What was the purpose of your telling that to Mr. Lazarus?

77 A. Well, making the letter of credit to International Industries or assigns, that meant that they were turning over money to them and you just don't want to turn over money to someone whom you don't know.

Q. You meant to convey the impression to Mr. Lazarus that the defendants, Mr. San Roman and the International Industries, were reliable people? A. That's right.

Q. Liquor is often imported from foreign countries, is it not, by the distributors themselves? A. Yes.

Q. Does Schenley import any liquor from foreign countries? A. Yes.

Q. Frequently liquor is imported by importers, is it not for special order of distributors or wholesalers in the United States? A. By importers?

Q. Yes. A. Yes.

Q. And it would not have been an unusual transaction, would it, for the Globe Liquor Company to have gone to an importer and requested that the importer import into the United States and sell to Globe a given quantity

78 of liquor? A. No, it would not be unusual.

Q. That would have been a very usual transaction? A. Yes, it is done very often. That is why they have an import license, so that they can personally import it.

Q. You mean an importer? A. A wholesaler. When a wholesaler takes out an import license, he does it for the purpose that if he wants to import anything himself he is licensed to do so.

Q. In addition to a wholesaler having an import license, there are persons who are importers?

A. Importers?

Q. Who import for wholesalers for special order by wholesalers, is that not so? A. Yes.

Q. And it would not have been an unusual transaction for Globe to have gone to such an importer and requested the importation of such liquor for Globe's account? A. No, it would not have been unusual.

Q. As a matter of fact, that would have been a very usual transaction? A. Yes.

79 Q. And even though the wholesaler might have his own import license, he might, nevertheless, go to such an importer who would have such a particular source; is that correct? A. Yes. The purpose of an im-

porter, in normal times, having an import license—

Q. Now, by "importer", are you referring to one who is exclusively an importer? A. No; I say the purpose of a wholesaler having an importer's license was for the purpose of importing merchandise for himself, at the import price, rather than have an importer get the merchandise in and then resell it to him at a higher price.

Q. That is right; but there are certain importers, are there not, who have sources for liquor in foreign countries which are not available to a particular distributor or wholesaler in a particular locality of the country?

A. That is correct.

Q. Such a wholesaler or distributor, as the Globe Liquor Company, the plaintiff here, might well go to such an importer, even though Globe itself has an import license? A. That is correct.

80 Q. And that would be a frequent, day to day, occurrence? A. Yes, sir.

Q. And on such occasions the importer would import the liquor from the foreign country and resell it or sell it to Globe; is that correct? A. That is correct.

Q. As a matter of fact, in such transaction it would not be unusual, would it, for the importers to have the liquor consigned directly to the consignee, if the quantity purchased was sufficiently large? A. If the wholesaler had an import license, yes, sir. If the wholesaler did not have an import license he couldn't do it.

Q. But in this case Globe Liquor did have an import license? A. Yes, sir.

Q. So that it would not be an unusual transaction for Globe Liquor to go to an importer and have the importer direct the importation into this country of a quantity of liquor, consigned directly to Globe, and charge Globe for the merchandise? A. That is correct.

81 Q. That would be a relative—

A. That is the usual procedure.

Q. A usual procedure? A. Yes, sir. We do that in our company very often.

Q. Now, in such a transaction Globe Liquor Company might or might not know who the foreign shipper was, is that not correct?

Mr. Kahn: If they were buying direct?

Mr. Heineman: No.

Do you understand the question?

The Witness: I would like you to repeat it.

Mr. Heineman: All right.

Q. Where the Globe Liquor Company were buying from an importer, with the merchandise consigned directly to Globe, Globe might or might not know who the shipper was in the foreign country, is that correct?

A. That would depend on the product.

Q. Will you explain that? A. Well, if Globe were buying, or any other wholesaler, were buying a product, they would want to know what the product is and what the package looks like. That is in normal times. During the times when whiskey was scarce, it didn't make any difference what the package looked like. They might
82 want to see the label.

To follow through on that, they would want to see what the package looked like, what the label looked like, and most of the time on the labels the distiller's name is on there.

If the importer from whom the wholesaler was buying the merchandise, the importer would have on that label who the shipper is.

Q. The shipper or the distiller? A. The distiller.

Q. The shipper and the distiller are not occasionally the same person, are they? A. Not always.

Q. Is it frequently the fact that the shipper and the distiller is the same person? A. It depends upon where you buy your merchandise. If you buy it from France or Spain, the distiller is the shipper in most instances. They have a broker but the broker does not appear as the shipper. And at other times, from Mexico and Argentine, there may be two or three people intervening between the distiller and the importation of it.

Q. Now, returning to the question that I asked you, your answer then to the question of whether Globe,
83 if it bought from an importer, with consignment direct to Globe, would necessarily know who the shipper was, or would be—your answer was "no" I understand? A. That is right; unless the importer said, "Make your letter of credit"—

Now, when merchandise came in from Spain or Argentine, the letters of credit were made directly to Argentine and to Spain and not to the importer.

I did some business for Guaivi in New York. They are importers. They had their letters of credit made directly to Spain and to Argentine and not to them, although they were the importers.

Q. And being the importers, they were the seller and the purchaser? A. That is right.

Q. It was customary, was it not, in cases in which the wholesaler or distributor would buy directly from an importer, with consignment direct to the wholesaler, for the wholesaler not to know the name of the shipper? He might or might not know? A. That is possible.

84 Q. In such cases the wholesaler, the purchasing wholesaler, would be relying upon the standing and credit of the importer with whom he dealt; is that correct? A. Yes.

Q. Why did you return the commission of $750 that you had been paid by the Globe Liquor Company?

A. Mr. Lazarus is a friend of mine and he wrote me and told me that he would like to have the check back, and to keep his friendship I returned the check. Seven hundred and fifty didn't mean that much to me. Not that I couldn't use it; don't misunderstand me.

Q. Did you feel badly about the way the transaction turned out? A. Very badly. Not from a personal loss on my side. I want you to understand that. Because I was involved in the transaction, I felt badly to think that the merchandise came in that condition.

Q. Did you at any time examine the condition of the merchandise? A. No.

Q. Did you go to the warehouse where it was held?

A. No.

85 Q. Did you talk to any of the representatives of the Bureau of Internal Revenue? A. No, sir.

Q. Are you familiar with condemnation procedure? A. No, sir.

Q. Now, you also testified that in the course of your conversation with Mr. Lazarus on March 16, 1944, you advised him that it would be safer for him to have the letter of credit made payable to the International Industries; is that correct. A. Yes, sir.

Q. What did you mean by "safer"? A. Well, I hadn't too much confidence in the Mexicans' way of operating their business, from reports that I had received of various transactions from other people who had done business in Mexico, and rather than have him send his letter of credit directly down there to the shipper, or a bank in Mexico, and they do things very slowly and very slipshod, I thought it would be safer, probably, for him to do business with a letter of credit to International Industries or assigns.

Q. What you mean is that if the letter of credit had gone directly to the so-called shipper in Mexico, that the merchandise might never have been shipped?

86 A. They had a peculiar habit—

Q. Will you answer the question? A. Yes.

Q. That the merchandise might never have been shipped; is that correct? A. Yes.

Q. And the shipper would have the merchandise and the money? A. That is right.

Q. And the Globe Liquor Company would have parted with its money and have no merchandise? A. That is correct.

Q. So you advised him to make the letter of credit payable to the International Industries? A. According to the instructions of Mr. Sam Roman, to make it to them.

Q. So as to protect the Globe Liquor Company against such an eventuality? A. That is right.

Q. Who suggested the use of the customs broker, Joviti Perez to the Globe Liquor Company, do you know? Was that suggested by you? A. I don't recall whether it was suggested by me from Mr. Sam Roman. I

87 think I told Mr. Lazarus that name, which I got from Mr. Sam Roman, or to use his own broker, whichever he preferred.

Q. As a matter of fact, didn't he advise you that they had no customs brokers in Laredo and that they would use the broker that you recommended? A. I think so.

Mr. Heineman: I have no further questions.

Redirect Examination by Mr. Kahn.

Q. Mr. Todes, in your conversation with Mr. Lazarus, on March 16, 1944, do you recall telling him that one of the reasons the letter of credit was made to run in favor of International Industries or assigns, was to also assure International Industries the payment of its brokerage?

A. No, sir, I did not tell him that.

Q. What did you say about him having the letter of credit run in favor of International Industries or assigns?

A. To help Mr. Lazarus to prevent him from sending a letter of credit down to Mexico to the shipper or the distiller, and say that he would pay for the merchan-

88 dise when it reached the United States through a United States bank.

Q. Do you recall that in the letter of credit requirements that you discussed, it was to be specified that the Mexican shipper's commercial invoice in triplicate was to be produced? A. That was in the form that was sent me and I gave it to Mr. Lazarus.

Q. Do you recall whether the form for the letter of credit also stipulated that the original bill of lading, issued to the order of the Mexican shipper blank endorsed was in the form? A. I recall that it was in the form.

Q. Are you familiar with the precedure of buyers furnishing letters of credit in the sale of liquor in the United States during March of 1944 ? A. What do you mean by that? Am I familiar with the procedure? You mean letters of credit were issued for merchandise to be imported into the country?

Q. Yes, were you familiar with that? A. I know that whenever anyone wanted to get merchandise out of the country, they issued letters of credit.

89 Q. You have seen letters of credit, haven't you?

A. I never had anything to do with letters of credit until I did this business. My business was all in the United States.

Q. Then your statements in response to Mr. Heineman's questions, as to the nature of sending a letter of credit to Mexico was not based on your actual experience, was it? A. No, I said it was from reports that I had gotten of transactions.

Q. Well, don't you know that no money can be paid, under a letter of credit, until the shipping documents are first produced? Don't you know that as a general rule?

A. Can they be forged?

Q. I beg pardon? A. Can they be forged?

Q. Forged? A. Shipping documents.

Q. I suppose anything can be forged at any time, at any place.

You told Mr. Lazarus the reason for having the letter of credit read to the International Industries or assigns was to insure the delivery of the merchandise into the

90 United States; is that right? A. No, I said it was safer.

Q. I see. You told him that, did you? A. I said it was safer.

Q. You were following the directions of Mr. San Roman, weren't you? A. Exactly.

Q. And you had a form there for a letter of credit?
A. That's right.
Q. And you gave it to Mr. Lazarus? A. I gave it to Mr. Lazarus.
Q. So far as you know, he followed that form?
A. I suppose he did. After all, Mr. San Roman handled the transaction financially. My job was to sell.
Q. You personally don't know much about the mechanics of the procedure of letters of credit at all?
A. I do not.
Q. That is out of your line? A. That is right.
Q. You have never had any personal experience in letters of credit? A. No.

91 Q. Now, do you know, of your own knowledge, from the conditions of the liquor business during the months of April, May, June and July of 1944, whether there was a drop in the buying demand of Tequila during those months?

Mr. Heineman: That is objected to as irrelevant to any of the issues in this case.

Mr. Kahn: You may answer subject to counsel's objection.

The Witness: A. There was no drop in the buying in April and May, and probably not in the first week in June. Buying did not drop. The demand for importations did not decline until there was an announcement that there would be a liquor holiday; that is, the resumption of making American whiskey, in the month of August, 1944.

Mr. Kahn: Q. When was that announcement made?
A. I think in May sometime.
Q. Of what year? A. 1944.
Q. What happened to the market on Tequila after that announcement?

Mr. Heineman: That is objected to on the ground
92 that it would be irrelevant to any issue.

Mr. Kahn: You may answer.

The Witness: A. There just wasn't any demand for it.

Mr. Kahn: Q. The bottom dropped out of the Tequila market, is that it? A. Yes, sir.

Mr. Kahn: You may cross examine.

Recross Examination by Mr. Heineman.

Q. You advised Mr. Lazarus that the letter of credit should be made payable to the International Industries

or assigns because it was safer for the Globe Liquor Company, is that correct? A. Yes, sir.

Q. You thought that you were following your instructions from Mr. San Roman when you made such a statement? A. No, sir. He never instructed me to say that it was safer.

Q. He instructed you to get the letter of credit made payable to International Industries or assigns?

93 A. Yes, sir.

Q. And when you advised Mr. Lazarus that the purpose of so doing was because it was safer for Globe Liquor Company; that was your understanding of the reason, is that correct? A. Yes.

Q. You have heretofore testified as to why you thought it was safer? A. Yes, sir.

Q. And you expressed those reasons to Mr. Lazarus? A. Yes, sir.

Q. And whether you knew or did not know anything about the letter of credit procedure, those were your reasons and those were the reasons you gave Mr. Lazarus? A. Yes.

Mr. Heineman: No further questions.

Redirect Examination by Mr. Kahn.

Q. During this March 16th, 1944 conversation with Mr. Lazarus, when you told him the International Industries would not be responsible for the shipment of the merchandise or the quality of the merchandise, what, if

94 anything, did he say? A. Nothing.

Q. He didn't object to that statement on your part? A. No.

Q. He had no comment? A. I understand—

Q. You can not give us your understanding. You can only state what you heard and what was said. A. All right.

Q. Was there any comment about it at all? A. No comment.

Mr. Kahn: That is all.

And thereupon it was stipulated by and between the parties hereto, by their respective counsel, that the signature of the witness to this, his deposition, may be waived, and that the same may be read on the trial of this cause with the same force and effect as if the witness

had read, signed and again made oath to the same.

95 United States of America
Northern District of Illinois
Eastern Division.

State of Illinois,
County of Cook—ss.

I, Harry Michaelson, a Notary Public in and for the County of Cook and State of Illinois, do hereby certify that the foregoing deposition of Mr. Gabriel H. Todes, of Baltimore, Maryland, was taken on behalf of the defendants in a certain cause now pending and undetermined in the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein Globe Liquor Co., Inc., a Delaware Corporation, is plaintiff, and Frank Sam Roman and Dorothea Sam Ronan, doing business under the firm name and style of International Industries, are defendants, before me, at the office of Nat M. Kahn, Suite 1757, No. 33 South Clark Street, Chicago, Illinois, on Monday, the 24th day of December, A. D. 1945, at 9:30 o'clock a. m.; that Mr. Ben W. Heineman was present on behalf of the plaintiff and Mr. Nat M. Kahn on behalf of the defendants during the taking of said depositions; that the said witness was duly sworn by me before the commencement of this deposition;
96 that by agreement of counsel for the respective parties the signature of the witness to the deposition was waived; that said deposition was taken down in shorthand by me and afterwards transcribed into typewriting under my direction; that the taking of said testimony was concluded on the 24th day of December, A. D. 1945.

I further certify that I am not connected by blood or marriage with either of the parties to this suit, nor am I a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, or financially interested in the action, or interested, directly or indirectly in the matter in controversy.

In Witness Whereof, I have hereunto set my hand and seal this 8th day of January A. D. 1946.

Harry Michaelson

(Seal) Notary Public.

98 And afterwards on, to wit, the 21st day of February, 1946 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Motion To Strike Defendants' Deposition Of Gabriel H. Todes in words and figures following, to wit:

99 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 45 C 120 * *

MOTION OF PLAINTIFF TO STRIKE DEFENDANTS' DEPOSITION OF GABRIEL H. TODES.

Now Comes Globe Liquor Co., Inc., plaintiff herein, by its duly authorized attorney, Ben W. Heineman, and respectfully moves the Court to strike the deposition of Gabriel H. Todes, taken by the defendants in opposition to the plaintiff's motion for summary judgment and in support of the defendants' motion for summary judgment.

In support of this motion, the plaintiff respectfully shows that by said deposition the defendants seek to vary the terms of a written contract between the plaintiff and the defendants, all in violation of the parol evidence rule.

/s/ Ben W. Heineman
Attorney for the Plaintiff.

100 And afterwards on, to wit, the 6th day of June, 1946 there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings, had on March 11-14, 1946 in words and figures following, to wit:

102 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—Civil Action No. 45 C 120) * *

TRANSCRIPT OF PROCEEDINGS.

had in the above-entitled cause before the Hon. John P. Barnes, one of the Judges of said Court, and a jury, in the

United States Court, at Chicago, Illinois, beginning on March 11, A. D., 1946, at 2:00 o'clock P. M.

Present:

Ben W. Heineman, Esq.,
(of Messrs. Swiren, Heineman & Antonow,
135 S. LaSalle St., Chicago 3, Ill.),
on behalf of plaintiff;

Nat. M. Kahn, Esq.,
(33 S. Clark St., Chicago 3, Ill.),
on behalf of defendants.

103 And thereupon the following proceedings were had herein:—

And thereupon, a jury having been duly empaneled and sworn to try the issues herein, the following:

And thereupon Mr. Heineman addressed the jury in opening statement on behalf of the Plaintiff:

By Mr. Heineman: Ladies and Gentlemen of the Jury:—At the commencement of a lawsuit the attorney for the plaintiff, which in this case is the Globe Liquor Company, takes the opportunity to make a statement to the jurors about the case, in order that the jurors may understand the evidence better as it is put in.

Usually the attorney for the defendant also makes a statement, to explain to the jurors his view of the case.

What we say to you at this time is not evidence, but is what we believe the evidence will show.

You should listen to what we say to you at this time, to assist you in understanding the evidence. But it is the evidence that is actualy admitted by Judge Barnes, and the law as given you by Judge Barnes, which should control—which must control your decision.

Now, the Globe Liquor Company is a wholesaler of liquor. Its principal place of business is Wilmington, Delaware.

It has come to Chicago to file this suit because that is where the defendants live and have their principal place of business.

In March of 1944, a man by the name of Todes called on Mr. Lazarus at his place of business at the Globe Liquor Company in Wilmington, and said that he was a

salesman for International Industries; that the principal partner of International Industries was Mr. Sam Roman, that gentleman there (indicating Mr. Sam Roman).

He told the Globe Liquor Company that he was selling Mexican Tequila, which is a form of liquor manufactured in Mexico, and asked whether Globe wished to buy.

And the Globe Liquor Company said that they would buy 750 cases. And by a form of order and an exchange of letters a contract was entered into to buy 750 cases of tequila at $10.75 a case.

That was to be C.I.F. Laredo, Texas, which is a port of entry into the United States.

The tequila was to come from Mexico.

Mr. Todes left with the Globe Liquor Company a form of letter of credit—an irrevocable letter of credit, which is a document which in this type of transaction enables the seller to know that the money for the goods is available when the goods are delivered.

And the Globe Liquor Company bought an irrevocable letter of credit in the approximate amount of $8,000, which represented the total cost of the shipment, from the Chase National Bank of New York.

And that letter of credit, which was irrevocable, and which was made out to International Industries, that is, to the defendant or their assigns, was then sent to Mr. San Roman—to the International Industries in Chicago.

The money was to be paid against the delivery of what are called shipping documents, that is to say, the bill of lading and the invoices and all the rest from Mexico.

There was a subsequent, rather considerable exchange of correspondence.

Revenue stamps had to be printed and sent to Mexico, to be put on the bottles before they could be brought 106 into the United States.

Labels describing the liquor had to be put on the bottles, and on the cases, and had to be registered in this country and approved.

And then in late May the defendants advised the Globe Liquor Company that the shipment had left Mexico, and was on the way.

Shipments of liquor come into the United States in bond, which means that they cannot be taken out of bond by the purchaser until they have been inspected by the Food and Drug Administration, to make certain that they

are not adulterated—not harmful to drink, in the case of liquor; and then not until the tax is paid by the purchaser.

These 750 cases of tequila came into the country in bond, were shipped to Wilmington, Delaware, where they were inspected by the officials of the Food and Drug Administration.

Before they reached Wilmington, Delaware, the shipping documents had been presented by Mr. Sam Roman, the defendant—one of the defendants, together with the irrevocable letter of credit, and the funds were paid to International Industries; in other words, the irrevocable letter of credit was cashed, or negotiated, we will say,
107 just like a check.

When the liquor got to Wilmington it was inspected by officials of the Pure Food and Drug Administration—the Food and Drug Administration; and upon inspection they found that the tequila was adulterated, in that it contained particles—glass particles dangerous to health.

The Globe Liquor Company—or, I should say, the Government of the United States refused thereupon to release that liquor from bond; in other words, refused to permit Globe Liquor Company to claim the liquor which it had purchased.

Thereupon Globe Liquor Company immediately made demand upon the defendants in this case for a return of the purchase price, because after all they could not receive and use the liquor.

The defendants claimed that they were not really the sellers, that they were only agents for the sellers, and that Globe Liquor Company should seek to recover its money from the seller—from the persons whom the defendants here say were the real sellers, some people—Gonzalo A. Larrea, in Mexico.

108 Our people said—the plaintiff said that the only persons whom they had known in this transaction, the only persons with whom they had dealt, were the defendants; they had assumed that the defendants were selling them the merchandise, and they insisted upon payment, that is, upon return of the money.

But the return of the money was refused. And for that reason we are here before you ladies and gentlemen today.

That in very brief summary is the substance of the plaintiff's position.

As I told you, it is not what I say to you, it is not what Mr. Kahn, the attorney for the defendants will say to you, it is the evidence that counts, it is the evidence that comes in here, that is admitted by his Honor, Judge Barnes.

And thereupon Mr. Kahn addressed the jury in opening statement, on behalf of the Defendants.

By Mr. Kahn: May it please the Court, and Ladies and Gentlemen of the Jury:—

The opening statement in behalf of defendants, and
109 what the defendants will seek to prove, are these facts:

In the spring of 1944 there was a great shortage of liquor in the United States. The demand was far short of the supply.

The plaintiff, the Globe Liquor Company, who are wholesale liquor dealers—experienced wholesale liquor dealers in Wilmington, Delaware, a corporation, were very anxious to get liquor of any kind from anywhere.

My clients, Mr. Frank San Roman, and his wife, doing business under the name of International Industries—and by the way, that name is merely a name that they use, and they have two rooms, or a space at 600 North Michigan Avenue, and carry on an export business; and my clients have had considerable business dealings as agents in Latin countries principally, and they knew of a source where Mexican tequila could be purchased.

Mr. San Roman the prior winter, or several months prior to the spring of 1944 had made the acquaintance of one Gabriel H. Todes, who has been in the liquor brokerage business a good many years, who lives at Syracuse,

New York, who was a personal friend of Morton
110 Lazarus, vice-president of the Globe Liquor Company. And Mr. Todes knew that the Globe Liquor Company were in the market for liquor. And he told them what he had learned, that the Internationaal Industries of Chicago, that is, Frank San Roman knew a source where Mexican Tequila could be purchased, and gave them a price of $10.50 a case for the plain, or white colored tequila, and 25 cents a case extra for the gold or yellow colored tequila, known as Mariachi Tequila, that is the trade-name.

Mr. Todes told Mr. Lazarus that they were in the international business, that they did not handle the merchan-

dise anyway, and didn't have possession of it, and never had a right to possession of it, but knew where it could be purchased in Mexico.

And he announced also that the brokerage that Mr. Todes was to receive, and did receive from my clients was 25 cents a case—or 35 cents a case for the gold, 10 cents extra for the additional market price.

Mr. Lazarus was so anxious to get this tequila from Mexico that he paid Mr. Todes what is known as a finder's commission. That is, when the buyer is anxious to buy
111 he will pay a broker an extra commission or brokerage to be sure that he will be able to buy the merchandise.

And this finder's commission was one dollar a case, or four times the amount that Mr. Todes was to receive from my clients.

And he received this finder's commission with the full knowledge and approval of my people.

Mr. Todes told Mr. Lazarus that since International Industries did not handle the merchandise in any way, that it could come directly from Mexico. That the responsibility for the quality and the time of shipment would be the sole responsibility of the shipper, and not International Industries, the broker.

And International Industries could not and would not be responsible for anything in connection with the shipment.

And Mr. Lazarus agreed to those stipulations.

Although at the time Mr. Todes did not state the name of the shipper, the reason is obvious. Because the demand for liquor was so strong in behalf of purchasers that had they known the name of the shipper, and his name and location they could have dealt directly with the ship-
112 per, and in that way would obviate and deprive my clients from the small commission they were to earn.

The total amount involved is something like $8,060.50 for the 750 cases.

My clients received a brokerage of $1,012.50, of which they paid out practically all in salesman's commission to Mr. Todes, and other expenses.

Now, the money was not paid to International Industries.

Here is the way payment was made.

When you deal with a seller in a foreign country he won't ship when he gets a mere order. That is just a piece of paper to him. He wants to be sure that when he ships merchandise from Mexico or Argentina, or any

Latin country, and delivers it all the way up here in the United States, that the money will be here for payment.

Accordingly, there is a device known as a letter of credit, where the buyer goes to the bank and makes credit arrangements.

And his bank in this case was the Chase National Bank, which issued its letter of credit, stating that if the merchandise, 750 cases of this tequila would come here,
113 with certain documents, namely, the shipper's invoice directly from Mexico certifying that the merchandise was in good condition, and so on, that is the documents would come directly from the shipper, and upon the delivery of those documents here, at the First National Bank in Chicago, who was the appointed sort of clearing house, that if the documents were in good order, if they showed that the merchandise was here and available in this country with the bill of lading, that is, the title papers that the railroad gives you, and the Mexican shipper's invoice showing that the Mexican shipper sold directly to the Globe Liquor Company, that if all these papers were in order, then and only then is the merchandise paid for, since the San Romans were only getting a small portion of this money, and the shipper wanted to be sure that he would get his money, so he insisted on this bill of lading, and the bill of lading was made—I beg your pardon, the letter of credit. And the letter of credit was in favor of International Industries here, or assigns. And because of the words "or assigns", Larrea, the shipper, who knew of this arrangement—then and only then, when he knew there was a letter of credit delivered, moved forward with
114 his shipment. And it came up here.

So the money was not paid to International Industries but was paid to the First National Bank, the agent appointed by Globe Liquor Company itself to act as the clearing house for this payment.

All the documents were in order.

My folks got their $1,012, and the rest of the money went to Mexico.

Now, this tequila was distilled by a distiller named Francis Rubio, of Mexico.

The shipper, however, was a man by the name of Gonzalo A. Larrea, also in Mexico.

The original order that Mr. Lazarus gave Mr. Todes was not a contract. You will see it in the evidence. It

was nothing more than a request and offer—we offer to buy so much tequila at such and such a price.

Now, before Globe would be liable under this transaction all the documents from the Mexican shipper would have to be here available for inspection by Globe or by its agent, or the Chase National Bank.

So before they let loose of their money they had the full opportunity to see that all the title papers and 115 documents were in order.

The merchandise, which my clients never saw to this day, was delivered in bond.

The Government people came to inspect it.

There are 9,000 bottles for 750 cases.

There are 12 bottles to a case.

The Government inspectors took only forty-eight bottles.

And out of those forty-eight bottles, five bottles showed the presence of foreign matter—loose glass.

And they held up the shipment.

In other words, the evidence will show only 5 bottles out of 9,000 contained this loose glass.

It is quite possible there may have been some defects in the blowing of the glass when the bottles were made. And in the jerking of the cars all the way from Mexico, all the way to Wilmington, why some of those glass particles came loose.

As soon as Globe were notified of this inspection, they notified my people, and we immediately wired Larrea.

Larrea immediately sent a wire to Globe and offered 116 at his own expense to re-filter and re-bottle the merchandise.

Globe refused that offer.

And the reason for the refusal also is obvious.

During the interim from the time the order was given on March 16, 1944, until July when this re-filter offer was made, you folks may remember that there was a distilling holiday, and the market was flooded.

So the bottom dropped out of the tequila market.

No one wanted tequila when they could get whiskey.

And because of the drop in the market Globe refused that offer to refilter and to re-bottle.

And they refused to take the shipment because of the drop in the market.

Before Globe ever incurred the liability of one cent on this transaction, before the merchandise was even sent

out of Mexico on May 10, 1944, my folks sent Globe a letter saying:

"We are enclosing herewith an affidavit of the shipper which you will need in fixing your OPA ceiling
117 prices."

Attached to that letter was the affidavit of Gonzalo A. Larrea, the name of the shipper.

So Globe knew exactly with whom they were dealing, they knew the name of the shipper and his address before the order was ever accepted. They knew who they were dealing with.

If they didn't want to deal with him, they could have withdrawn that order.

And before the shipping documents came up here on May 27, 1944, the Customs broker at Laredo, Texas, who represented Globe, sent Globe a letter saying that the merchandise was enroute, and again told them the name of the shipper, who was Gonzalo Larrea.

And when the shipping documents came they showed, as you will see when you examine them, that the sale was made directly from the shipper in Mexico to Globe Liquor Company in Wilmington, Delaware.

The name of the shipper was Gonzalo A. Larrea.

His location was given.

Consular invoices were attached—consular statements were attached, and there was a certificate by Larrea
118 showing that the merchandise was in good condition, and of good quality when he delivered it to the carrier railroad.

And going back a bit, Mr. Todes also told Mr. Lazarus —and he is the man that took the order originally—he told Mr. Lazarus that the order would be subject to acceptance and confirmation by the shipper in Mexico.

And that is exactly what happened, as will be shown by the documents.

The shipper shipped the merchandise and Globe accepted it.

And in this case it is unfortunate that these people who are beginners in this business advanced and paid their money. But they didn't pay it to our folks. And they knew that our folks were brokers.

Under the circumstances we did everything that anyone could have done to straighten out the transaction.

After the trouble started Mr. San Roman took it upon himself to make a trip to Mexico to try to straighten the

thing out. But Mr. Larrea evidently didn't want to bother with it. He made one offer to refilter and re-bottle the merchandise but it was rejected.

119 I think you will find the reason that Globe didn't go through with this transaction is that the market dropped off and they found it very unprofitable.

But our folks were the disclosed agents of a disclosed shipper. And that even if the shipper's name was not known to Globe they knew and understood and agreed with Mr. Todes that they bought knowing that the sole responsibility for the quality, the delivery, or anything about the shipment would be that of the shipper in Mexico, and not Mr. San Roman and his wife here in Chicago.

* * *

By the Court: Do you want to put a witness on tonight?

By Mr. Heineman: Whatever is convenient for your Honor.

By the Court: I usually adjourn at four-thirty and it is about that now, you see.

By Mr. Heineman: I think perhaps with so short a time remaining it might be more convenient for the jury, to give them the connected story in the morning.

By the Court: Very well.

120 I have a first call of cases at ten o'clock.

Accordingly, you gentlemen, and the jury may come in at ten-thirty.

And let me say to you ladies and gentlemen of the jury, do not discuss this case with anyone, nor permit anyone to discuss it with you. If anyone attempts to communicate with you about the case, report that fact at once to the court. You will not discuss the case amongst yourselves until finally it is submitted to you for decision at the close of the case.

Report here tomorrow morning promptly at ten-thirty.

(Whereupon an adjournment herein was taken until the following day, March 12, A. D., 1946, at the hour of 10:30 o'clock a. m.)

121 * * (Caption—Civil Action No. 45 C 120) * *

Chicago, Illinois,
March 12, 1946,
10:30 o'clock a. m.

Met pursuant to adjournment.

Present:
Mr. Heineman,
Mr. Kahn.

And thereupon the following proceedings were had herein:

By the Clerk: 45 C 120. Globe Liquor Co., Inc., against Frank San Roman, on trial.

By the Court: I will take it up at the end of the call.

(Thereupon the Court gave attention to other matters upon call, after which the following:—)

(And thereupon a recess herein was taken until 2:00 o'clock p. m. of the same day, March 12, 1946.)

122 * * (Caption—Civil Action No. 45 C 120) * *

Chicago, Illinois,
March 12, 1946,
2:00 o'clock p. m.

Met pursuant to recess.

Present:
Mr. Heineman,
Mr. Kahn.

And thereupon the following further proceedings were had herein:—

By the Clerk: 45 C 120. Globe Liquor Co. Inc., against Frank San Roman, on trial.

By the Court: I shall have to let you folks go again, gentlemen, until tomorrow morning.

By Mr. Heineman: Is that tomorrow morning?

By the Court: Yes.

By Mr. Heineman: I have some witnesses from out of town, your Honor.

By the Court: I can't help it. I am sorry.
By Mr. Heineman: All right.

(Whereupon an adjournment herein was taken until the following day, March 13, 1946, at the hour of 10:00 o'clock a. m.)

123 * * (Caption—Civil Action No. 45 C 120) * *

Chicago, Illinois,
March 13, 1946,
10:00 o'clock a. m.

Met pursuant to adjournment.

Present:
Mr. Heineman,
Mr. Kahn.

And thereupon the following further proceedings were had herein: —

By the Clerk: 45 C 120. Globe Liquor Co., Inc., against Frank San Roman, on trial.

By the Court: I will take it up as soon as I get through with the call.

(And thereupon the Court gave attention to other matters upon the call, after which the following:—)

And thereupon, at 11:10 o'clock a. m., on March 13, 1946, the following further proceedings were had herein:

(The jury took their places in the jury box.)

124 By the Court: Good morning, ladies and gentlemen.
By the Jurors: Good morning, your Honor.
By the Court: You may proceed, gentlemen.
By Mr. Heineman: Thank you, your Honor.
Mr. Morton Lazarus, please.

And Thereupon, the Plaintiff, to Maintain the Issues in its Behalf, Introduced the Following Evidence:—

MORTON L. LAZARUS, called as a witness on behalf of the plaintiff, having been first duly sworn by the Court, testified as follows:

Direct Examination by Mr. Heineman.

Q. Will you state your full name, please? A. Morton L. Lazarus.

By the Court: I did not get that.

By the Witness: Morton L. Lazarus.

By Mr. Heineman: Q. Spell your last name.

A. (Spelling) L-a-z-a-r-us.

By the Court: Morton L. Lazarus?

By the Witness: Yes, sir.

125 By Mr. Heineman: Q. Will you state your business or occupation, sir?

A. I am Vice-President of Globe Liquor Co. of Wilmington, Delaware.

Q. Will you keep your voice up so that both the jury and the Court can hear you?

A. I am Vice-President of Globe Liquor Company of Wilmington, Delaware.

Q. You are Vice-President of the Globe Liquor Company? A. Yes.

Q. For how long have you been Vice-President?

A. Eight years.

Q. What is the character of the business of the Globe Liquor Company? A. We do a jobbing business, that is we sell to the saloons and hotels and clubs—sell wholesale.

By Mr. Heineman: If the Court please, in order to save time, I think with almost no exception both counsel have examined each other's exhibits, and are familiar with them.

Again, I think almost with no exception, the authenticity of them is admitted. And accordingly we shall not go through the process of identifying them by the witness, but simply have them marked and admitted, if that is 126 satisfactory to your Honor.

By Mr. Kahn: Just show them to me singly, and we will save time on it.

By the Court: Very well.

By Mr. Heineman: Will the reporter please mark this document Plaintiff's Exhibit 1?

By Mr. Kahn: No objection.
By the Court: It may be received.

(Said document was received in evidence by the Court, and marked PLAINTIFF'S EXHIBIT 1. Said document is as follows:—)

127 By Mr. Heineman: Q. I show you a document marked Plaintiff's Exhibit 1—

By Mr. Heineman: I would like to read Plaintiff's Exhibit 1 to the jury. It appears to be a form of order blank, and reads as follows:

Order No. ..... Date.....3/16/44.....
M .....International Industries.....
Ship to .....600 So. Michigan Ave.....
At .....Chicago.....
How Ship .....Globe Liquor Co. .....
..... Wilmington, Del. .....
750 Ga , 5's Tequila $10.50
(Mariachi Gold)
C.I.F. Laredo, Texas
60-day letter of credit
Import License 1-1408
Globe Liquor Co.
By: M. L. Lazarus.

By Mr. Heineman:

Q. Would you state in your own words, please, whether that document was signed by you on or about the date it bears?

A. That is right.

128 Q. Would you state what that is, please?

By Mr. Kahn: Objected to. It speaks for itself.

By Mr. Heineman: Very well. Counsel is quite right. I withdraw the question.

(Question withdrawn.)

By Mr. Heineman: Q. Do you recall a Mr. Gabriel Todes? A. I do.

Q. Did he call on you on or about March 16, 1944?

A. Yes, sir.

Q. And did he come to see you at your place of business? A. He did.

Q. Would you state the purpose of his call?

A. Well, Mr. Todes was a whiskey salesman, and a broker, and he came up and solicited me, to sell me some tequila.

Q. Did he tell you whom he was representing?

A. He said he was representing International Industries of Chicago.

Q. Did you place an order with him? A. I did.

By Mr. Kahn: I object to leading the witness. I
129 think counsel should permit the witness just to state what the conversation was.

By the Court: Yes.

By Mr. Heineman: Q. Did you buy any tequila from him? A. Yes, sir.

Q. At that time? A. Yes.

Q. Did you give any written document to show that you had purchased tequila?

By Mr. Kahn: I object to that as calling for a conclusion; there is an order in evidence that speaks for itself.

By Mr. Heineman: I think that I am entitled to ask.

By Mr. Kahn: That is one of the issues in this case, as to whether that was a binding contract.

By the Witness: Can I state what transpired?

By Mr. Kahn: Why, yes.

By Mr. Heineman: Q. Yes. A. We talked the mat-
ter over, and I gave him an order for 750 cases of
130 tequila and he said, "Confirm it by giving me a written order". So we didn't have any forms actually to confirm it, and I keep a regular salesman's order book at my desk, so I wrote him up an order for it, what I wanted, I wrote up the order, and I wrote exactly what I specified, and that is a confirmation of my order there (indicating document).

Q. And is Plaintiff's Exhibit 1 a photostatic copy of the order? A. Yes.

Q. That you wrote, and that you have just described?

A. That is right.

By Mr. Heineman: Will you mark this Plaintiff's Exhibit 2?

(Document marked as directed.)

By Mr. Heineman: Q. The reporter has marked as Plaintiff's Exhibit 2 what purports to be a letter from Mr. Todes to Mr. Lazarus, at the Globe Liquor Company, dated March 24, 1944, which I now offer in evidence.

By Mr. Kahn: No objection.
By the Court: It may be received.

(Said letter was received in evidence by the
131 Court and marked PLAINTIFF'S EXHIBIT 2.
Said exhibit is as follows:)

By Mr. Heineman: I should like to read Plaintiff's Exhibit 2 to the jury, if I may. It is on the letterhead of

GABRIEL H. TODES
903 Lake Drive
Baltimore 17, Maryland

March 24, 1944

Mr. Morton Lazarus,
Globe Liquor Company,
18th and Market Streets,
Wilmington, Delaware.

Dear Mr. Lazarus:

This will confirm our telephone conversation of this morning relative to your order of Mariachi Tequila Gold, wherein the price for the Gold is $10.75, which is 25 cents more than the White, and which was agreeable to you.

Will you please forward to me your confirmation on this price, as I have already advised International Industries to cable your order to Mexico.

Please execute your letter of credit exactly in accordance with the form which I left with you, with the
133 exception of changing the price from $10.50 to $10.75, and substituting your own customs broker in the place of Jovita Perez, if you so desire.

I wish to take this opportunity to thank you again for your patronage.

Kindest regards,
(Signed) Gabriel H. Todes

ght/pn
cc: International Industries.

By Mr. Heineman: If the Court please, there is a further stipulation that counsel have made, prior to the commencement of this proceeding:

Certain of these letters show that carbon copies have been dispatched to various other persons. It is stipulated

that the carbon copies were sent to the companies or persons shown by the exhibits at or about the date or dates of the exhibits, and were received within a few days thereafter, in the ordinary course of mail.

134 By the Court: Very well.

By Mr. Heineman: Q. Mr. Lazarus, Plaintiff's Exhibit 2, the letter which I have just read to the jury, refers to a telephone conversation, in which the price was increased from $10.50 to $10.75. Would you state what happened, please? A. Well, I think the usual tequila is white, and we didn't care particularly about it being white, and we wanted the colored. It is colored by some process, and they charge 25 cents a case extra for the color. And we specified the colored instead of the other.

By Mr. Heineman: Will the reporter please mark this Plaintiff's Exhibit 3.

(Said document was accordingly marked PLAINTIFF'S EXHIBIT 3, as directed.)

By Mr. Heineman: Q. The reporter has marked as Plaintiff's Exhibit 3 a copy of a letter from Mr. Lazarus, Vice-President of the Globe Liquor Company, to Mr. Gabriel H. Todes, dated March 27, 1944, which I now offer as Plaintiff's Exhibit 3.

By Mr. Kahn: No objection.

135 By the Court: It may be received.

(Said document was received in evidence by the Court, and marked PLAINTIFF'S EXHIBIT 3. Said exhibit is as follows:—)

136 By Mr. Heineman: I should like to read this letter to the jury.

Zone 246
March 27, 1944

Mr. Gabriel H. Todes,
903 Lake Drive,
Baltimore, 17, Maryland.

Dear Gabe:

This confirms our order placed with you last week for 750 cases of Mariachi Tequila Gold at $10.75 f.o.b. Laredo, Texas. We have put through the letter of credit in ac-

cordance with the specimen you left here, but I changed to Tequila where you had the word Vodka.

Be sure to instruct the International Industries that these cases cannot come into Delaware without the Delaware State stickers which will be sent to any address that is specified when they notify us that the shipment is ready to come forward.

These stickers are only sent after we have paid the state tax, so that you should wire us in ample time for us to pay the tax and have these stickers forwarded—

137 one to be put on each case.

Trusting that this is clear to you and with kind personal regards,

Very truly yours,
Globe Liquor Co., Inc.
s/ Morton Lazarus,
Vice President.

ML:MS

By Mr. Heineman: Would you state whether Plaintiff's Exhibit 3 was a letter directed by you to Mr. Todes in response to his letter to you, which has been introduced in evidence as Plaintiff's Exhibit 2? A. Yes.

By Mr. Kahn: That is admitted.

By Mr. Heineman: Q. Mr. Lazarus, Plaintiff's Exhibits 2 and 3 refer to a letter of credit: Did the Globe Liquor Co. obtain such a letter of credit? A. Yes.

By Mr. Kahn: That is all admitted, if you will show me that and the other.

138 By Mr. Heineman: If counsel will please permit, I am very anxious to expedite this.

By Mr. Kahn: All documents that we have looked at are admitted. Just produce them, and one glance at them will suffice if they are in.

By Mr. Heineman: I am going to have to ask counsel to permit me to try this case in my own fashion, your Honor. I will do my best to expedite it.

Will the reporter please mark this Plaintiff's Exhibit 4.

(Said document was marked PLAINTIFF'S EXHIBIT 4, as directed.)

By Mr. Kahn: No objection to the admission of Plaintiff's Exhibit 4.

By Mr. Heineman: I offer Plaintiff's Exhibit 4 in evidence.

By the Court: Very well. It may be received.

(Said document was received in evidence by the Court, and marked PLAINTIFF'S EXHIBIT 4. Said exhibit is as follows:—)

139 By Mr. Heineman: I don't think the record shows what it is.

I offer as Plaintiff's Exhibit 4 letter of credit dated March 29, 1944, by the Chase National Bank, payable to International Industries.

By Mr. Kahn: Does it say "or assigns" there?

By Mr. Heineman: Beneficiaries.

By Mr. Heineman: This is the letter of credit which I should like to read to you. It is in evidence as Plaintiff's Exhibit 4.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,
Pine Street Corner of Nassau,
New York.

Irrevocable Commercial Letter of Credit
Cable address Chasebank, New York,
No. 25668 $8,062.50

International Industries,
600 S. Michigan Avenue,
Chicago, Illinois.

Gentlemen:

We hereby authorize you to draw on The Chase National Bank, New York by order of Wilmington Trust Company, Wilmington, Delaware, and for account of 140 Globe Liquor Co., Inc., up to an aggregate amount of Eight Thousand Sixtytwo Dollars and Fifty cents (U. S. Currency) available by your drafts at sight for full invoice value, payable at First National Bank of Chicago, Chicago, Illinois Accompanied by: Mexican Shippers' Commercial Invoice in triplicate, showing "750 cases of Tequila (Gold color) at $10.75 per case, CIF Laredo, Texas" Consular invoice in duplicate Insurance certificate Original bill of lading issued to order of Mexican Shipper blank endorsed evidencing shipment of 750 cases of Tequila to Laredo, Texas. Partial shipments are not permitted. Of the above documents the original consular invoice and original bill of lading are to be forwarded by the negotiating bank direct to Jovita Perez, 112 Convent Ave., Laredo, Texas. Certificate to this effect and the remaining documents are to accompany the draft. This credit may be assigned provided the assignee is a person,

firm or corporation in whose favor the issuance of this credit is permissible under the Trading With the Enemy Act of the U. S. A. and Executive Orders and drafts must be drawn and negotiated not later than May 28, 1944.

Each draft must state that it is "drawn under letter
141 of credit of The Chase National Bank, New York, No. 25668 dated March 29, 1944," and the amount endorsed on this letter of credit.

We hereby agree with the drawers, endorsers, and bona fide holders of all drafts drawn under and in compliance with the terms of this credit, that such drafts will be duly honored upon presentation to the drawee.

"Regulations issued thereunder. Should drafts under this credit be drawn by assignee they must be accompanied by your letter of assignment.

Yours very truly,

.....

Second Vice President Assistant Cashier

.....

Assistant Manager, Foreign Department

AS-dz

Non-Negotiable Copy

By Mr. Heineman: If the Court please, I have asked someone from the First National Bank to come over to testify with respect to letters of credit. I should like the indulgence of counsel to put him on the stand. He is
142 a busy man, and I would like to put him on.

By the Court: Any objection?

By Mr. Kahn: None at all. You should have put him on first.

By Mr. Heineman: I would appreciate it if counsel would refrain from those comments.

By Mr. Kahn: Put him on, by all means.

(The witness Morton L. Lazarus was thereupon temporarily withdrawn.)

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143 By Mr. Heineman: Would you take the stand, Mr. Tedford?

FRED B. TEDFORD, called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Heineman.

Q. Will you state your name, please? A. Fred B. Tedford.

Q. Will you spell that for the reporter?. A. (Spelling) T-e-d-f-o-r-d.

Q. What is your business or occupation? A. I am a banker.

Q. At what bank? A. First National Bank.

Q. How long have you been connected with the First National Bank ? A. Since February of 1929.

Q. And were you a banker before that? A. I was.

Q. Will you state where? A. I was in several
144 banks; I was with the Union Trust Company before that.

Q. I think that is sufficient. In what department of the First National Bank are you employed? A. Foreign Banking Department.

Q. Does that banking department deal with letters of credit? A. It does.

Q. Do you in the ordinary course of your business each day, or from day to day deal with letters of credit? A. We do.

Q. And do you personally? A. I do.

Q. And are you familiar with the practices followed with respect to letters of credit, and in particular with respect to the practices followed by the First National Bank of Chicago? A. I am.

Q. I show you Plaintiff's Exhibit 4, would you state if you have ever seen that before? A. You mean this?

Q. Yes. A. Yes, I did, I saw it this morning.
145 Will you state where and when for the first time?

A. You showed it to me this morning just before coming into the court room.

Q. Would you state what the practice of the First National Bank would be, oh, say, in 1944, with respect to the dates—

By Mr. Heineman: Withdraw that question.

(Question withdrawn.)

By Mr. Heineman:

Q. Would you state what functions the First National Bank of Chicago would perform when a letter of credit like that, or a similar letter of credit was presented to the First National Bank of Chicago for payment?

By Mr. Kahn: I object to that, for the following reasons:

The evidence that should be submitted was what was actually done. If there is someone else at the bank that actually handled this transaction, I am going to produce him, as I have told counsel. And I don't think the witness should be permitted to testify what was the custom and practice. The thing sought is what actually did occur
146 in this particular transaction, and that is susceptible of proof.

By Mr. Heineman: If the Court please, counsel on his opening statement made several statements with respect to the functions performed by the Bank in connection with letters of credit.

A letter of credit, as your Honor knows, is a complicated banking transaction. I know it is difficult for me to understand, and I have studied it somewhat. I would like this witness, who is qualified, as an expert, to explain the practice and custom with respect to letters of credit. And I think that that is proper evidence.

By Mr. Kahn: If your Honor please, there is no expert testimony required on an ordinary banking transaction with a letter of credit.

And as I stated heretofore, there is one of the employes of the bank who actually handled this particular Globe Liquor Company transaction with the accompanying letter of credit issued by the Chase National Bank. He is available to testify, and will tell exactly what did happen, and
147 what the bank's functions were in this particular transaction. It does not require an expert; nothing complicated, nothing peculiar, nothing unusual about it.

By Mr. Heineman: Our clients were in Wilmington, Delaware. The evidence has shown that Mr. Lazarus of our client, was directed to conform to the letter of credit, which they followed meticulously.

Our clients have no idea what transpired at the First National Bank of Chicago when this letter of credit was cashed.

By Mr. Kahn: I object to counsel testifying.

By Mr. Heineman: They are in Wilmington, Delaware, and they don't know—

By Mr. Kahn: I object to that, to the testimony of counsel.

By Mr. Heineman: If Mr. Kahn is going to put a witness on, whom I don't know, and with whose testimony I am not familiar, who is going to testify that they did something that is in accord with their ordinary practice and custom—

By Mr. Kahn: I object to that.

By Mr. Heineman: (Continuing)—I am entitled to show what that particular custom and practice was.

148 By the Court Objection overruled.

By Mr. Heineman: Thank you. Would you read the question?

(The pending question as above recorded was read by the reporter, as follows:

"Q. Would you state what functions the First National Bank of Chicago would perform when a letter of credit like that, or a similar letter of credit was presented to the First National Bank of Chicago for payment?")

By Mr. Heineman:

Q. (Continuing) Upon the presentation of a draft under that letter of credit, would you state what the First National Bank would do, or would have done in the summer of 1944, with respect to the payment of that draft under that letter of credit, and letters of credit of that kind?

By Mr. Kahn: I object to that for the reasons heretofore given to similar questions.

By the Court: Do you have a uniform custom, Mr. Witness?

By the Witness: Yes, there is.

149 By The Court: You may tell us what it was in the summer of 1944.

By The Witness: When the draft is presented—

By Mr. Heineman:

Q. Speak up so the jury can hear you. A. I say, when the draft is presented, the documents which are attached to the draft are checked to see whether or not they conform to the conditions outlined in the credit. If they do conform strictly with the conditions outlined in the credit the draft is paid.

Q. The First National Bank would pay the draft at once? A. Yes.

Q. Would it send the documents to the Chase National Bank in New York, or to Wilmington, Delaware, before payment? A. Before payment?

Q. Yes. A. No.

Q. Now, referring to this particular letter of credit, Exhibit 4, would you state what the conditions of that letter of credit were?

By Mr. Kahn: I object to that. It speaks for itself
150 in the very letter of credit.

By Mr. Heineman: I am asking him to state in order—

By The Court: Let me see it.

(Document handed to the Court.)

By Mr. Heineman: I am not asking him to state the contents.

By Mr. Kahn: It requires a draft.

By Mr. Heineman: I am asking him to state merely what it says.

By Mr. Kahn: I can read. It requires a draft drawn on the Chase National Bank. The draft was paid in New York under the terms of that particular letter of credit.

By The Court: It is not plain to me. I will let the witness state.

By Mr. Heineman:

Q. State what the conditions of that particular letter of credit were, please. A. I don't think I understand your question.

Q. You have stated that the bank upon presentation of a draft would pay that draft if the conditions of the letter of credit were met; is that correct? A. Can I ask what you mean by "payment?" We would give them
151 the money.

Q. That is what I mean.

A. We don't consider that final payment, though. The draft is drawn on the Chase National Bank of New York, and that is where it is payable.

Q. When presented to the First National Bank, who is the beneficiary of this letter of credit? A. The beneficiary of this letter of credit is the International Industries.

By Mr. Kahn: If the Court please, the document itself shows that the letter of credit may be assigned.

By The Witness: Right.

By Mr. Kahn: And it was assigned. So the question was, I think, unfair.

By Mr. Heineman:

Q. Are you familiar with letters of credit—you have testified that you are—are you not? A. Yes.

Q. May I ask you again, who is the beneficiary of that letter of credit? A. The beneficiary of that letter of credit is the International Industries, if it has not been assigned.

Q. And if it has been assigned? A. Then the as-
152 signee.

Q. Thank you. If the beneficiary of that letter of credit, whoever that may be, presented, or presents a draft on the First National Bank, under this letter of credit, or letters of credit comparable to it, does the First National Bank pay the money to the person presenting the draft if the conditions of the letter of credit are met? A. Yes, we do.

By Mr. Kahn: Be plain! Did you say that the First National pays it? That is what I understood you to say—just the other way around.

By Mr. Heineman: Objected to. Counsel will have full opportunity to cross examine.

By The Court: Sustained.

By Mr. Heineman:

Q. You understood my question? A. I think I did.

By Mr. Heineman: Will you read the question so that there will be no confusion?

(The record as above recorded was read by the reporter.)

By Mr. Kahn: I want to register a further ob-
153 jection, that the evidence as to what actually happened in this case is available, which is different.

By The Court: Overruled.

By Mr. Heineman:

Q. You have heard the question, and you heard the answer, and that was the correct answer to that question? A. Yes.

Q. Would you state the conditions of that letter of credit?

By Mr. Kahn: Objected to, the document speaks for itself.

By The Court: Overruled.

By The Witness: You mean, you want me to read the whole credit?

By The Court: Just tell us.

By The Witness: The conditions constitute the whole credit.

By Mr. Heineman:

Q. If a draft under this letter of credit had been presented to you as a banker at the First National Bank, in the Foreign Department, what would you have done to satisfy yourself whether you should pay the money
154 to the man presenting it?

By Mr. Kahn: I object to that. There is actual evidence as to what happened.

By The Court: Overruled.

By Mr. Kahn: I am merely stating—

By The Witness:

A. We would first examine the draft to see whether or not the draft was drawn in proper form and in accordance with the terms of the credit. Then we would proceed to examine the documents attached to that draft to determine whether or not those documents conformed to the conditions of the credit.

By Mr. Heineman:

Q. And under this letter of credit what documents would you have looked for? A. We would have looked for a Mexican commercial invoice in triplicate showing 750 cases Tequila gold color at $10.75 per case cif Laredo, Texas; consular invoice in triplicate; insurance certificate; original bill of lading issued to the original shipper with blank endorsement.

Q. Those are the documents you would have looked for? A. Those are the documents that we would have looked for.

155 Q. Are there any other things you would do before paying the money to whoever presented the draft under this letter of credit, if it had been presented to you in 1944? A. None that I think of at the moment.

Q. That is all you would have done. Is that correct? A. I think so.

Q. Would you have inquired who was the owner of the Tequila in question? A. No, we would not.

Q. Would you have made any inquiry into the terms of the contract between the buyer and seller? A. We would not.

Q. Would you even have determined whether or not the documents attached to the draft were genuine?

A. We would not.

By Mr. Heineman: No further questions.

156 *Cross Examination by Mr. Kahn.*

Q. Mr. Tedford, you personally did not handle this Globe Liquor Company transaction, did you?

A. No, I did not.

Q. When was the first time you ever heard about the transaction? A. I am not sure. I probably heard about it more or less at the time; but the first time it came to my particular attention was this morning.

Q. Mr. Tedford, did the bank have a different procedure on shipments originating from Mexico during the spring and summer of 1944 than what you have testified to?

By The Witness: I didn't get that question.

By Mr. Kahn: Read it.

(The pending question as above recorded was read by the reporter.)

By The Witness:

A. No, it did not.

By Mr. Kahn:

Q. Isn't it a fact that on shipments originating from Mexico, which were to be paid eventually on a letter of credit issued by an eastern bank, that when the docu-
157 ments would come from Mexico, like the shipper's invoice and the customers invoice and the like, you would take the draft and all those papers and send them east to the Chase National Bank? A. Certainly.

Q. That was the procedure? A. Absolutely.

Q. That was the uniform custom of the bank? A. Yes.

Q. That particular letter of credit you have there provides for a draft to be drawn on the Chase National Bank, doesn't it? A. It does.

Q. In other words, the First National Bank of Chicago itself did not advance its funds to pay the invoice price, but it called on Chase to do it, didn't they—if you can tell from that letter of credit? A. I can't tell from this letter of credit.

Q. But what you have said about the custom on Mexican invoices and shipments previously was your custom?

A. We would do it if requested.

Q. You don't know what happened in this partic-
158 ular case? A. No, sir, I don't.

Q. Can you tell to whom the letter of credit was assigned? A. I can't.

By Mr. Heineman: If it was assigned.

By Mr. Kahn:

Q. Do you know whether it was assigned? A. I do not.

Q. You have seen the term "shipper's invoice" frequently in letters of credit, haven't you? A. Yes, sir.

Q. Doesn't that mean that the invoice—which is the bill in common language—for the merchandise in question is the invoice of the shipper in Mexico? A. It is.

Q. And that the assignee's or buyer's name is usually inserted in these Mexican shipper's invoices? A. It is.

Q. And that the consular invoice in duplicate is also a bill or invoice required by the United States consular regulations, which also contains the name of the shipper in Mexico and the name of the buyer in the United States? A. That is true.

159 Q. And you would give the same answer as to the insurance certificate, in the name of the shipper in Mexico, which would be on the insurance certificate plus the name of the buyer in the United States which would appear thereon? A. The name of the shipper would probably show, but not necessarily the buyer.

Q. The original bill of lading issued to order of the Mexican shipper, blank endorsed, doesn't that mean that the shipper in Mexico delivers the tequila to the railroad or other carrier in Mexico, and as a bill of lading it is evidence of the goods being in the possession of the carrier, and made out and issued to the shipper—the Mexican shipper, and that the Mexican shipper in turn takes that bill of lading and endorses it on the back? A. That is right.

By Mr. Kahn: That is all.

Redirect Examination by Mr. Heineman.

Q. Mr. Tedford, I think perhaps some little confusion has become introduced into your testimony—

By Mr. Kahn: I object to that.

160 By Mr. Heineman:

Q. (Continuing)—did you mean to—

By The Court: Overruled.

By Mr. Heineman:

Q. (Continuing)—to suggest that in the summer of 1944 when a letter of credit was presented—I mean when a draft was presented under this letter of credit, that the First National Bank did not make the funds available at once to the person presenting it? A. Sometimes we do and sometimes we don't; but in a case like this we would be perfectly willing to give it to them on the strength of the Chase National Bank.

Q. And so long as the conditions of the credit were complied with? A. Exactly.

Q. Then you would honor the draft and collect the money from the Chase National Bank? A. We would.

By Mr. Kahn: I object to that question and answer as being in the speculative, and not as to what actually happened.

By The Court: Overruled.

161 By Mr. Heineman:

Q. Is it your uniform practice to act as a paying agent for other banks on letters of credit?

By Mr. Kahn: I object to that. The witness answered "in some cases we do and in some cases we don't," it depends on the request of the shipper.

By Mr. Heineman: I am sorry. I don't think counsel understood the question.

By The Court: I understood it perfectly. Overruled.

By Mr. Heineman: Will you answer that question?

By The Witness: State it again, please.

By Mr. Heineman: Yes.

By Mr. Heineman:

Q. Where you act as the paying agent for another bank under a letter of credit, then you uniformly collect the funds that you pay from the bank issuing the credit, don't you?

By Mr. Kahn: I object to that. There is no evidence that the First National Bank acted as the paying agent. The letter itself shows that the First National merely acted as the middle man or clearing house in the
162 whole transaction.

By Mr. Heineman: Objected to. The letter of credit says, "This letter of credit is payable at the First National Bank."

By Mr. Kahn: That doesn't mean they pay it. It is payable at the First National Bank.

By Mr. Heineman:

Q. Do you understand what I mean when I say "paying agent?" A. I am not so sure I do.

Q. Your bank acts as paying agent in numbers of situations, does it not? A. Yes, we do.

Q. And your bank has frequent occasion, does it not, to pay for the accounts of other banks. A. We do.

Q. When you are presented with a letter of credit from the Chase National Bank, such as this one, for example, with the draft and the necessary documents, would you pay it if the draft were presented to you?

By Mr. Kahn: Objected to as speculative. It assumes things that are not in evidence, and assumes a situation which is not justified by the letter of credit.

163 By The Court: Overruled.

By Mr. Heineman:

Q. Would you answer that question? A. We don't consider that really paying the draft; we are simply advancing the money.

Q. For whom? A. For the Chase National Bank.

Q. But you are advancing the money at once for the account of the Chase National Bank? A. We would do so if requested.

By Mr. Heineman: No further questions.

Recross Examination by Mr. Kahn.

Q. I understand you to say, Mr. Tedford, a few moments ago that you would advance the First National's funds if requested? A. Yes.

Q. You don't know what happened in this particular case? A. I do not.

By Mr. Kahn: That is all.

By Mr. Heineman: No further questions.

(Witness excused.)

164 By Mr. Heineman: Will you resume the stand please, Mr. Lazarus.

MORTON L. LAZARUS, a witness heretofore called on behalf of the plaintiff, having been heretofore first duly sworn, resumed the stand and further testified as follows:

Direct Examination (Con'd) by Mr. Heineman.

Q. You are the sameMorton L. Lazarus who has heretofore been sworn and testified? A. I am.

By Mr. Kahn: Will you repeat that, please?

(Record read by the reporter.)

By Mr. Heineman: Will you mark these Plaintiff's Exhibits 5, 6 and 7, please?

(Said documents were marked, respectively, PLAINTIFF'S EXHIBITS 5, 6, and 7, as directed.)

By Mr. Heineman: I offer as Plaintiff's Exhibit 5 a letter from International Industries to Globe Liquor Co., dated April 1, 1944.

And I offer as Plaintiff's Exhibit 6 a revised form 165 of letter of credit which is attached to Plaintiff's Exhibit 5.

And I offer as Plaintiff's Exhibit 7 a telegram from International Industries to Globe Liquor Co., dated April 10, 1944.

By Mr. Kahn: No objection to all three.

By The Court: They may be received.

(Said documents were received in evidence by the Court and marked, respectively, PLAINTIFF'S EXHIBITS 5, 6 and 7. Said exhibits are, respectively, as follows—)

166 By Mr. Heineman: Plaintiff's Exhibit 5 is a letter from International Industries dated April 1, 1944, to Globe Liquor Company, Inc., Wilmington, Delaware.

International Industries,
600 South Michigan Avenue,
Chicago 5, Illinois, U. S. A.
Telephone Harrison 3266.

April 1, 1944.

Globe Liquor Company, Inc.,
Wilmington, Delaware,
Gentlemen:

We are sending herewith copy of letter addressed to the Wilmington Trust Company of Wilmington, Delaware in which we acknowledge receipt of L/C No. 25668 in the amount of $8,062.50.

By Mr. Heineman: Is it stipulated, Mr. Kahn, that that reference is to Plaintiff's Exhibit 4, which has just been put in evidence, the letter of credit?

By Mr. Kahn: Yes.

By Mr. Heineman: (Reading continued) "We are also sending copy of L/C as established by The Chase National Bank of the City of New York by order of Wilmington Trust Co., "Likewise, we are sending a re-
167 vised form of the credit as it should be. You will note that we have made two or three changes as follows:

"1. Mexican shipper's commercial invoice in triplicate showing 750 cases Mexican Tequila (Gold Color) at $10.75 per case, *Inbond* cif Laredo, Texas. We are thus interpolating the words *inbond* which do not appear on the original letter of credit..

"2. Since yours represents only one-half of the entire car of 1,500 cases, the original bill of lading will have to be modified to indicate that the bill of lading will cover the entire lot of 1,500 cases and we have changed the wording of the original credit to read as follows: Original bill of lading, issued to order Mexican shipper, blank endorsed, evidencing shipment of 1,500 cases of Tequila to Laredo, Texas, it being understood that the balance of 750 cases represents a separate shipment included in the same car and destined for another consignee.

"With the above changes referred to, the credit in our opinion would be in order.

"Monday we expect to have additional labels from
168 Mexico and we will send them to you for registration.

Yours very truly,
International Industries,
F. San Roman,
Managing-Director.

F. San Roman: pm.
enc. cc.: G. H. Todes."

By Mr. Heineman: In order to avoid the necessity of reading in the revised form of credit, Mr. Kahn, will you stipulate that there was inclosed the revised form which has been introduced as Plaintiff's Exhibit 6, which forms a part of this exhibit which I have just read into the record?

By Mr. Kahn: Just add that at the beginning of Plaintiff's Exhibit 6, that it is addressed to "International Industries or Assigns."

By Mr. Heineman: Oh, yes, there is that additional change.

By Mr. Kahn: Yes.

By Mr. Heineman: That is right. Will you stipulate?

169 By Mr. Kahn: Yes, with that change.

By Mr. Heineman: It is stipulated that the enclosure with this letter, which is the letter which I have just read, is this "revised form". I think it unnecessary to read that.

Now, Plaintiff's Exhibit 7 is a telegram from International Industries to Globe Liquor Company, Wilmington, Delaware.

"Western Union

"P ZA 283 WUCA 730 (Nine) NL-Chicago Ill. 10-April 10 P M 1142

Globe Liquor Co Inc
(Wilmington Delaware)

Under New Mexican Federal Revenue Regulations original commercial invoice which bears revenue stamps must accompany tequila shipment please therefore request your Bank to amend crdit to accept copies of Mexican shippers commercial invoice instead of original please wire confirming disregard other amendment requested our letter April first

International Industries".

By Mr. Heineman:

Q. Was this letter of credit amended in accord-
170 ance with this last request? A. It was.

By Mr. Heineman: Mr. Reporter, will you please mark these as Plaintiff's Exhibits 8 and 9?

(Documents marked, respectively, PLAINTIFF'S EXHIBITS 8 and 9, as directed.)

By Mr. Heineman: If the Court please, I offer as Plaintiff's Exhibit 8 what purports to be a notice of exclusion from the United States Federal Security Agency, Food and Drug Administration, of the tequila in question, by the Food and Drug Administration of the United States Government, upon the grounds—

By Mr. Kahn: I object to that. You can just identify it for us in the presence of the jury. It is dated July 12, 1944. I object to the admissibility of the document. And I should like to be heard a few minutes on it.

By the Court: All right, step into the jury room, ladies and gentlemen.

(Thereupon the jury retired from the court room, 171 and the following proceedings were had out of the presence and hearing of the jury:—)

By Mr. Heineman: Since I assume that your objection also goes to Plaintiff's Exhibit 9, why don't you argue both of these together? Plaintiff's Exhibit 8 was received first by the defendants, in point of time.

By Mr. Kahn: Now, as to Plaintiff's Exhibit 8 for identification, this notice is addressed to John A. Steer & Co., whom I assume were acting for the Globe Liquor Company.

If that document is admitted in evidence, it may be highly prejudicial to the defendants. And I think it should be excluded as an exhibit, for the following reasons:

Towards the bottom of the document after "Description of Shipment", your Honor will find that the document states that there were 9,000 bottles in the shipment: "Sample taken 7-11-44 (3 bots.)".

On that showing, your Honor, in a civil suit between two individuals no person in an official capacity or otherwise could tell that an examination of three bottles 172 from a shipment of 9,000 reflects the physical condition of the entire 9,000 bottles.

I have authorities on that. I have prepared a brief, and I will give counsel a copy of the brief, exhibiting these various points which I would like to submit to the Court as we go along. (Handing document to the Court.)

If your Honor will please turn to page 4 of this memorandum of points and authorities, which cites 55 Corpus Juris 4. c and three authorities.

The proof that only a few units of the entire shipment is inferior did not justify the plaintiff in rejecting the entire shipment.

Then I submitted to your Honor the other day the International Remedy v. Hyde case, that findings and conclusions of the Department of Agriculture respecting adulteration are merely tentative and not binding; that the burden of proof is on the buyer to prove that the merchandise is inferior.

I say on the showing in that paper, Plaintiff's Exhibit 8 for identification, and the authorities sub-
173 mitted, that that paper should be excluded, not only because it is highly prejudicial but because it is incompetent to prove one of the basic burdens of the plaintiff in this case, that a substantial part of the 9,000 bottles contained foreign matter justifying the rejection of the entire shipment.

By Mr. Heineman: May I be heard, your Honor?

By Mr. Kahn: Now, as to Plaintiff's Exhibit 9 for identification—

By Mr. Heineman: Oh, I beg your pardon.

By Mr. Kahn: That of course is highly prejudicial. That follows and is based on Plaintiff's Exhibit 8 for identification. Plaintiff's Exhibit 9 for identification is highly prejudicial, and would be, to the rights of my client before the jury.

By Mr. Heineman: I propose to follow these two with that affidavit, your Honor, that you will recall you examined the other day, showing exactly what was done.

It seems to me that what Mr. Kahn argues may
174 properly be a matter of argument by him to the jury.

But the fact remains that the plaintiff here had tequila shipped to them in Wilmington. The next thing they knew, they received in the ordinary course of business, without any inquiry or solicitation by them, an official notice from the Government of the United States, in which it is stated,

"We have determined that the tequila in question is adulterated as containing glass and foreign particles, to-wit, ground glass."

That is clearly competent evidence of what the United States thought of that shipment.

Whether there are different legal consequences flowing from that, or whatever inference may be drawn from

that, may be a matter of judgment for the jury if this matter gets to the jury. And it seems to me that as a matter of competent evidence it is clearly relevant and competent.

It shows the detention by the United States. It shows that the merchandise was never delivered. And it shows the reasons that the United States had for detaining the merchandise.

175 I should say that the cases which counsel cites are not cases involving forcible detention by the United States. They are sales cases in which the merchandise is shipped directly to the buyer. The buyer makes a quick sampling and finds out that the quality is not up to standard of sample or warranty as the case may be, and rejects it.

By the Court: Let me see the order.

By Mr. Kahn: If counsel will produce one case—

By the Court: No, your order, your papers which show the order.

By Mr. Heineman: I am sorry. (Documents handed to the Court).

By Mr. Kahn: If counsel will produce one case that a buyer can reject payment of an entire shipment on an examination of a few units by a government agency, I will withdraw my objection.

By Mr. Heineman: The question is not whether we rejected. We never had an opportunity to reject it. The Government would never deliver it.

176 The contract is made up of these three documents (handing documents to the Court).

By Mr. Kahn: I object to that, if the Court please. That is counsel testifying.

By Mr. Heineman: We will show it.

By Mr. Kahn: That is not so.

By Mr. Heineman: Wait until we get up to that point.

By Mr. Kahn: Don't be assuming things as you go along.

By the Court: What does "CIF" mean?

By Mr. Heineman: Cost, insurance and freight.

By Mr. Kahn: At Laredo, Texas.

By Mr. Heineman: If your Honor would examine the affidavit, you will note that what was done was that they took four cases out of a shipment of a hundred and fifty, and examined them.

By Mr. Kahn: Forty-eight bottles.

By Mr. Heineman: That is four cases, forty-eight bottles.

By Mr. Kahn: Forty-eight bottles.

By Mr. Heineman: May I make a statement to the Court, please?

These four cases composed of forty-eight bottles
177 were sampled and examined—forty-eight bottles.

They found that five had foreign particles. Whereupon they took three to the laboratory to determine what those foreign particles were. And they found that the three contained glass.

In point of fact these five bottles were chosen at random out of forty-eight bottles. There were 750 cases. And if that same proportion were maintained throughout the 9,000 bottles it would represent better than ten percent of the entire shipment which were adulterated.

And there is one more rather important point: We have put in the request of the defendant that the letter of credit be modified to show that the shipment was in bond; hence what it means is that they are not in the country at all until inspected and passed by the Food and Drug Administration.

By Mr. Kahn: If that is so, then your people ought to sue some bank here if they paid the money.

178 By Mr. Heineman: Let us confine ourselves to this. I am giving your Honor the picture. And I am just giving you another defense.

By Mr. Kahn: You are not giving me another defense. But if what counsel says is so, I don't know, then some bank is at fault, if they paid on this letter of credit before it cleared the bond.

By Mr. Heineman: The letter of credit specified the conditions which were set forth by your client. And your banker testified that they pay according to the conditions; they do not even look to see if the documents are true documents. They look to see if they are attached to the draft, if the documents are attached as specified.

The defendants knew that this tequila must pass the test of the Food and Drug Administration.

But apart from any of this which in my judgment is pretty much controlling right here, the fact remains that these notices were received from the United States Government saying, "We are not going to give you the

179 merchandise, for the following reasons". And it seems to me that in a suit like this they are clearly competent.

By the Court: I think they are admissible. Objection overruled. Bring in the jury.

(Thereupon the jury returned to the court room, and the following further proceedings were had in the presence and hearing of the jury:—)

By Mr. Heineman: I have offered Plaintiff's Exhibit 8. I now offer Plaintiff's Exhibit 9, your Honor.

By the Court: They may be received.

(Said documents were received in evidence by the Court, and marked, respectively, PLAINTIFF'S EXHIBITS 8 and 9. Said exhibits are respectively as follows:—)

180 By Mr. Heineman:

Q. I show you Plaintiff's Exhibit 8, which has just been admitted in evidence, and which appears to be a document—

By Mr. Kahn: I admit that they received it.

By Mr. Heineman: You admit that?

By Mr. Kahn: Of course. No question about it.

By Mr. Heineman: I will read Plaintiff's Exhibit 8 to the jury. It is a document entitled Federal Security Agency Food and Drug Administration 12-4 U. S. Customhouse, Phila-6, Pa. July 12, 1944" Counsel has admitted that the Globe Liquor Company received this.

"John A. Steer & Co.
Drexel Building,
Philadelphia-6, Pa. Lab. No. P-5300

Sir:

"Inspection and analysis of the sample from the following-described shipment having led to the result indicated below, you are hereby notified that action
181 under the provisions of the Federal Food, Drug, and Cosmetic Act, June 25, 1938, as to the exclusion of said shipment from consumption in the United States will be taken at the station of the Federal Security Agency at the above address three days (Sundays and holidays not included) from the above date, at which

time and place you may be present and submit testimony, or at or before which time you may file a statement in writing.

(Swm) cc to: Collector—2
" Wilmington, Del.—1

Respectfully,
C. S. Brinton
C. S. Brinton
Chief of Station

"Description of Shipment
Lab. No. P-5300 Label 'Mariachi Tequila Imported. Prod. of Mexico 100 proof 4/5 Quart' Broker Consignee John A. Steer & Co., Drexel Bldg., Phila. Globe Liquor Co., Inc., Wilmington, Del. Marks S M 1/750 es. "9000 bottles" 1800 gals. Value: $8062.50 (Quantity and value)
182 Shipper Manufacturer Gonzalo A. Larrea, S de R. L. Mexico, D. F.
Cons. Invoice Mexico 5872 5-23-44 Sample taken 7-11-44 (3 bots.) 7-11-44
Steamer Int. R. R. & P. R. R. (Via Laredo) Entry No. I. T. No. WH-IA (Wilmington Action Detained 7-12-44 Results of analysis: Place of production Mexico No. It Is Adulterated Under Section 402 (a) (1) Of The Food, Drug & Cosmetic Act Of 1938 since it contains a foreign substance dangerous to health—glass particles"

By Mr. Heineman: And Plaintiff's Exhibit 9 is headed: "U. S. Treasury Department Federal Security Agency Food and Drug Inspection Service Lab. No. P-5300

(Seal) Office of the Collector Copy

District No. 11 Port of Phila., Pa. January 16, 1945
750 cases (9,000 bot.) 'Mariachi Tequila' consigned to Globe Liquor Co., Inc., Wilmington, Delaware.
183 Sir:

"The examination of shipment of * * * per S. S. Int. R. R. & PRR (Via Laredo) Entry No. WH-LA (Wilmington), Marks and Number S M 1/750 750 cs.—9000 bottles has been completed and found not to comply with the provisions of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, in that it is Adulterated Under Section 402 (a) (1) Of The Food, Drug And Cos-

metic Act since it contains a foreign substance dangerous to health—glass particles.

"January 16, 1945, Statement of Conditions To Be Fulfilled:

"This importation was detained July 12, 1944, copy of detention notice being sent to the Collector at Wilmington, Delaware. No reply being received to same, this office issued the second and last notice January 2, 1945. Inasmuch as no reply has been received to our second & last notice, it is recommended that the goods be destroyed or exported under Customs supervision. Kindly notify this office on reverse side of this notice when and
184 how the goods have been either destroyed or exported.

(swm)

cc to: Collector, Phila., Pa. (1)

Broker—John A. Steer & Co., Phila., Pa.

"In case of failure to comply with the instructions stated above within three months from date of this notice, you are directed to return the above-described merchandise to the Collector of Customs, or action will be taken upon your bond given in compliance with section 801 of the said act. When the conditions have been complied with, and the merchandise is ready for inspection, notify Chief of Station by delivery of this notice properly certified on top of reverse, to Room No. 1204 U. S. Customhouse Philadelphia-6, Pa.

To: Collector of Customs

U. S. Customhouse
Wilmington, Delaware

Robert C. Stanfill
Acting Chief, Phila. Station
Collector."

185 By Mr. Heineman: I offer as Plaintiff's Exhibit 10, your Honor, the affidavit of Robert C. Stanfill, Chief, Food and Drug Administration, Philadelphia Station.

By Mr. Kahn: I object to that. It contains conclusions. I am not objecting to the fact that it is an affidavit. I told counsel he could use it in lieu of a deposition. I haven't any objection to the factual parts of it being read as to exactly what was done, and what was found. But I do object to the conclusions of the affiant.

By the Court: Particularly what?

By Mr. Kahn: The last two paragraphs on the first page, and the last paragraph on the second page. The rest of it is unobjectionable. (Handing document to the Court.)

By the Court: The last two paragraphs on the first page, and the last paragraph on the second page, is that it?

By Mr. Kahn: The last two paragraphs on the first page, and the last paragraph on the second page.

By the Court: Objection overruled. It may be
186 received.

(Said document was received in evidence by the Court and marked PLAINTIFF'S EXHIBIT 10. Said exhibit is as follows:—)

187 By Mr. Heineman: I will read you Plaintiff's Exhibit 10. It is an affidavit by Robert C. Stanfill, Chief, Philadelphia Station, Federal Security Agency, Food and Drug Administration.

I will pass the formal parts, and commence with the affidavit:

"I am an employee of the United States Government and I am Chief of the Philadelphia Station of the Food and Drug Administration of the Federal Security Agency, which Agency is charged with the enforcement of the Federal Food, Drug and Cosmetic Act; that records on file in the said Food and Drug Administration, and which I have examined, show that a duly authorized wharf examiner of the Food and Drug Administration examined in possession of a United States bonded warehouse in Wilmington, Del., and collected from the bonded warehouse samples labeled, in part, as follows:

Sample Laboratory No. P-5300
Product Tequila
Label "Mariachi Tequila Imported Prod. of Mexico 100 proof 4/5 quart."

188 "That the shipment examined and sampled under No. P-5300 was from a lot of 750 cases of 12 bottles each covered by Entry WH-LA (Wilmington) Tequila 750 cs. (9000 bottles) S M 1/750 from Gonzalo A. Larrea, S de R. L. Mexico:

"That on July 11, 1944, a representative of the Philadelphia Station of the Food and Drug Administration examined four cases or 48 bottles, the four cases having been taken at random without any selection;

"That in the 48 bottles examined, he found present in 5 bottles what appeared to be particles of glass;

"That he took as samples three of the 5 bottles in which glass particles appeared to be present and proceeded with them to the laboratory of Philadelphia Station of the Food and Drug Administration where examination of the particles in each of the three bottles showed the particles to be glass;

"That notice was given the importer on July 11, 1944 and that a written notice was issued on Form FD-777, Importer-Date of Hearing" on July 12, 1944, the notice of detention being sent to John A. Steer, Drexel Building, Philadelphia 6, Penna. with copies going to the
189 Collector of Customs, Philadelphia, Penna., and Deputy Collector of Customs, Wilmington, Del. The notice bore notice that testimony could be given or a written statement could be filed in writing within three days after the notice; also "description of shipment", and "results of analysis:

"'It is adulterated under Section 402 (a) (1) of the Food, Drug and Cosmetic Act of 1938 since it contains a foreign substance dangerous to health—glass particles'.";

"That no response having been received, an identical notice was sent to John A. Steer, et al, on January 2, 1945, on which was conspicuously stamped "Second and Last Notice. Shipment will be Refused Entry if you Fail to Reply";

"That no response or testimony was offered; therefore, the case was closed by this office on January 16, 1945 by an order for destruction or exportation of the goods, this order having issued on form FD-776a;

"That the procedures followed by the Food and Drug Administration were those customarily followed by Philadelphia Station under similar circumstances; and that the procedures followed were adequate to demonstrate that the shipment of Tequila is adulterated under
190 Section 402 (a) (1) of the Federal Food, Drug and Cosmetic Act of 1938 in that it contains a foreign substance which is dangerous to health: namely, glass particles.

Robert C. Stanfill
Robert C. Stanfill
Chief, Philadelphia Station

Subscribed and sworn to before me at Philadelphia, Penna., this 6th day of February, 1946.

Regina M. Sullivan

Employee of the Federal Security Agency designated under the Act of January 31, 1925, and Reorganization Plan No. IV, effective June 30, 1940."

By Mr. Heineman:

Q. Mr. Lazarus, did the Globe Liquor Company ever have delivered to it the 750 cases of tequila which it bought? A. No. The Government detained it.

By Mr. Kahn: I object to that; he should answer that "yes" or "no".

191 By Mr. Heineman: I think the witness should make his own answer. You don't want to stop the witness from answering, do you?

By the Court: Let him answer.

By Mr. Heineman:

Q. Would you answer? A. I say, the Government detained it so we had no access to it at all.

Q. Was it ever delivered it to you? A. No, sir.

By the Court: What was the answer?

(Record read by the reporter.)

By Mr. Heineman: Q. Was the letter of credit, which is in evidence as Plaintiff's Exhibit 4, ever cashed, and were the funds called for by that letter of credit paid by the Globe Liquor Company? A. They were.

Q. Did the Globe Liquor Company pay the freight for that tequila from Laredo, Texas, to Wilmington, Delaware?

By Mr. Kahn: I will admit all those items if you will just show them to me.

By Mr. Heineman: They are set forth in the 192 complaint.

May we have an off-the-record discussion for a minute, your Honor?

By the Court: We will recess at this time, Ladies and Gentlemen, until two o'clock. Be here promptly at two o'clock.

(Whereupon a recess herein was taken until 2:00 o'clock p. m. of the same day, March 13, 1946.)

193 * * (Caption—Civil Action No. 45 C 120) * *

Chicago, Illinois, March 13, 1946, 2:00 o'clock p. m.

Met pursuant to recess.

Present: Mr. Heineman, Mr. Kahn.

And thereupon the following further proceedings were had herein:—

By the Clerk: 45 C 120. Globe Liquor Co., Inc., against Frank San Roman, on trial.

By the Court: Proceed.

MORTON L. LAZARUS, a witness on behalf of the plaintiff, having been heretofore first duly sworn, resumed the stand and further testified as follows:

By the Court: Bring in the jury.

(Thereupon the jury took their places in the jury
194 box.)

By the Court: Proceed, gentlemen.

By Mr. Heineman: If the Court please, a stipulation has been entered into between counsel for the plaintiff and counsel for the defendant as to the costs and expenses incurred and paid by the plaintiff in connection with this shipment, so that I will read those amounts into the record:

The purchase price	$8,062.50
The cost of the irrevocable letter of credit was	19.69
The cost of 9000 Internal Revenue strip stamps was	90.00
The cost of cutting and imprinting the strip stamps was	12.75
The cost of forwarding the strip stamps was	14.49
The cost of preparing and handling the I.T. entry at Laredo, Texas was	11.37
The cost of preparing and handling the customs entry at Baltimore, Maryland, the port of entry, was	64.63
195 Freight charges from Laredo, Texas were	592.25
Customs storage at the rate of 5 cents per case per month in the United States Government warehouse from July 1, 1944, to April, 1946, was	787.50

Miscellaneous telephone and telegraph charges 25.00

Making the total cost and expenses incurred and paid by the plaintiff in this case 9,704.25

By the Court: Very well. It has been so stipulated.

Ladies and Gentlemen, it has been stipulated between counsel for plaintiff and counsel for defendant that the plaintiff paid out these sums for the items which have been enumerated—the various sums of money which counsel has stated to you.

The purpose of this stipulation is to save the time of the Court and of the jury.

By Mr. Heineman: Will you please mark this
196 Plaintiff's Exhibit 11?

(Said document was marked PLAINTIFF'S EXHIBIT 11, as directed.)

By Mr. Heineman: I offer as Plaintiff's Exhibit 11, if the Court please, a letter dated July 20, 1944; addressed to International Industries, the defendant, by the plaintiff, Globe Liquor Co., Inc.

By Mr. Kahn: I object to that. It is self-serving, and was after the controversy between the parties arose.

By Mr. Heineman: The purpose of the offer is—

By Mr. Kahn: And the stipulation we just made covers that.

By Mr. Heineman: No. If the Court please, the purpose is to show demand after breach of contract.

By Mr. Kahn: I will admit demand; you don't have to prove it.

By Mr. Heineman: No, I will put the letter in.

By Mr. Kahn: I will admit that the Globe Liquor Company asked my client for the money they spent.

197 By Mr. Heineman: Will you also admit that Globe Liquor Company not only made a timely demand for the money that they spent, but asked in addition for directions with respect to the disposition of the merchandise?

By Mr. Kahn: I will so stipulate.

By Mr. Heineman: In that case there is no occasion for me to put the exhibit in, your Honor.

May we have Exhibit 11—the number physically stricken so that our next exhibit may be Exhibit 11, your Honor?

By The Court: Yes.

(Said Exhibit number "11" was thereupon physically stricken from the aforesaid document.)

By Mr. Heineman: Cross examine.

Cross Examination by Mr. Kahn.

Q. Mr. Lazarus, did you ever receive a written communication of any kind from Gonzalo A. Larrea, the shipper in Mexico, telling you, or advising you or your firm that he had accepted your order?

198 By Mr. Heineman: That is objected to unless there is some foundation in this record: It is objected to, on several grounds.

First, it goes beyond the scope of the direct;

Second, there is no foundation in this record for the statement that Gonzalo A. Larrea is the shipper.

By Mr. Kahn: I will rephrase the question.

By Mr. Heineman: I withdraw that objection. There is foundation for the fact that he is the shipper, but there is no foundation showing that he is the seller of the merchandise, other than that he is a person who shipped merchandise from Mexico.

By Mr. Kahn: I will connect that up.

By the Court: What is the question?

(The record as above recorded was read by the reporter.)

By The Court: Objection sustained.

By Mr. Kahn:

Q. Did you ever receive a communication from the defendant, International Industries, telling you that Gonzalo A. Larrea, the shipper, had accepted your order of March 16, 1944? A. I don't recall the names after a couple of years; I would assume though that Inter-

199 national Industries accepted the order; and if they specified who the shipper would be, I don't recall.

By Mr. Kahn: I move that that answer be stricken as not responsive.

Read the question.

(Record read by the reporter.)

By The Witness:

A. No, sir.

By The Court: Well, do you want to strike out the answer?

By Mr. Kahn: Yes.
By The Court: Strike it out.

By Mr. Kahn:

Q. Did you ever receive a communication from anyone after you gave the original order to Gabriel Todes on March 16, 1944, that the shipper, Gonzalo A. Larrea of Mexico City had accepted your original order?

By Mr. Heineman: That is objected to for the grounds stated in my previous objection.

By The Court: Sustained.

By Mr. Kahn:

Q. Have you given the substance of the entire conversation you had with Mr. Gabriel Todes relative to
200 your giving him an order for 750 cases of tequila?

A. Well, the only thing I can say is just reiterate what I have said before.

Q. Was there anything else that was said between the two of you relating to the order, that you have not given?

A. Nothing of any importance.

Q. Didn't you promise to pay him a finder's commission of one dollar a case, or $750? A. Well, that is nothing unusual; that was customary.

Q. The question is, did you? A. Yes.

Q. And didn't you in fact— A. But I didn't offer it. That was his price, and I accepted his price.

Q. Didn't you in fact pay him $750? A. Yes.

Q. Or a dollar a case, as finder's commission?

A. I did.

Q. Did he show you a sample of this tequila?

A. He did not.

Q. Did you ask him for a sample? A. I did not.

201 Q. Didn't he tell you that the tequila was being shipped directly from Mexico? A. Well, naturally.

Q. Did he tell you that? A. Sure.

Q. Didn't he tell you that International Industries were not in the liquor business? A. I assumed they were brokers, I didn't know what kind they were, I assumed that they were whiskey brokers.

Q. You assumed that from what Mr. Todes told you?

A. When a man comes in selling whiskey, you assume that he is a whiskey man.

Q. A whiskey broker? A. Yes, sir.

Q. That is, unless he is a distiller of nationally advertised merchandise? A. Yes.

Q. Didn't he tell you that International Industries were not in the whiskey business? A. No. I assumed that International Industries were the brokers. They didn't have to be in the whiskey business.

Q. Didn't he tell you that they didn't have an im-
202 porter's permit to import whiskey into the United States? A. I don't recall.

Q. You know that, don't you?

By Mr. Heineman: I object to that unless he can show that he knew it at the time.

By The Court: Sustained.

By Mr. Kahn:

Q. Didn't he tell you that International Industries never had possession of the tequila? A. When you buy merchandise you don't go into all those details. You give a man an order, and you don't sit there and elaborate on their business. They are just minute details that are not of any importance, so you don't discuss it.

Q. But didn't he tell you that International Industries didn't have possession of this merchandise? A. Of course they didn't have possession, I was told this merchandise was coming from Mexico.

Q. Directly shipped to you? A. That is nothing unusual; we buy Scotch the same way, from Scotland.

Q. You are wholesalers and jobbers? A. Yes.
203 A. That is our principal business.

Q. To sell to retail stores? A. Absolutely.

Q. You also sell to wholesalers and jobbers as well? A. No.

Q. In March of 1944 there was a great demand for liquor of all sorts, was there not, in the United States?

By Mr. Heineman: That is objected to as irrelevant and going beyond the scope of the direct.

By Mr. Kahn: I will couple that up by showing that the reason for not accepting the merchandise was a drop in the market.

By The Court: Sustained.

By Mr. Kahn:

Q. Did you know Mr. Gabriel Todes prior to the time he dealt with you that day? A. I did.

By Mr. Heineman: Objected to as irrelevant, and I ask that it be stricken.

By The Court: Strike it out.

By Mr. Kahn:

Q. Had you known him more than five years?

205 By Mr. Heineman: Objected to, on the same grounds.

By The Court: Sustained.

By Mr. Kahn:

Q. Had you ever seen Mr. Todes prior to March 16, 1944?

By Mr. Heineman: Objected to on the same grounds.

By The Court: Sustained.

By Mr. Kahn:

Q. Have you any reason to believe that Mr. Todes is not a man of integrity?

By Mr. Heineman: Objected to.

By The Court: Sustained.

By Mr. Kahn:

Q. Now, the usual mark-up in your business when you buy from a distiller, or a shipper having merchandise, is about 20 percent, is it; isn't that right? A. It is not.

By Mr. Heineman: Objected to as irrelevant, your Honor.

By The Court: Sustained.

By Mr. Heineman: And would the witness refrain from answering questions until I have had a chance to 206 make my objection known to the Court?

By Mr. Kahn:

Q. This tequila came in two colors, did it not?

A. Yes.

Q. From the description given to you? A. Yes.

Q. The white, or the plain, is one kind? A. And the gold.

Q. And the gold, which is a gold or yellow color; is that right? A. That is right.

Q. And you preferred the gold? A. That is right.

Q. Mr. Todes left a form with you, did he not, for a letter of credit? A. He left—yes.

Q. You read that form? A. I wouldn't say I did.

Q. You had an opportunity to read it? A. They are pure formalities, Mr. Kahn, there is no significance.

Q. What did you do with that form? A. I kept it until he said to execute it. Then we copied it accord-207 ing to his subsequent requirements or whatever you prefer.

Q. Didn't you take that in to your bank? A. Yes.

Q. The First National Bank of Wilmington? A. Yes.

Q. Didn't you do that when you purchased the letter of credit in this case? A. Yes.

Q. Didn't you give them that form? A. Yes, they made up the form for us.

Q. And then submitted it to you? A. Well, I possibly had to sign it.

Q. You mean the application for letter of credit?

A. Yes.

Q. You gave it to your bank, the First National Bank of Wilmington? A. The Wilmington Trust Company.

Q. Or the Wilmington Trust Company, who in turn caused the Chase National Bank in New York to issue this letter of credit?

By Mr. Heineman: Objection. I want counsel to have full latitude, but it is admitted that the letter of credit was issued, and presumably application must have
208 been made. So I object to further questions along that line.

By Mr. Kahn: I want to show the opportunities for observing and weighing all these various conditions.

By The Court: Observing what?

By Mr. Kahn: That they had full opportunity to read them.

By The Court: They are all there. Nobody seems to seek to vary them.

By Mr. Heineman: Objected to on the grounds stated, your Honor.

By The Court: Sustained.

By Mr. Kahn:

Q. Now, you received quite a number of letters from International Industries after you gave the original order to Mr. Todes?

By Mr. Heineman: Objected to.

By The Court: Sustained.

By Mr. Kahn:

Q. You never met Mr. Frank San Roman, did you?

A. Not until this week.

Q. You have checked up on him, have you not?

A. I got a Bradstreet report after I had obligated
209 myself for that sum of money.

Q. You found he was a man bearing a good reputation?

By Mr. Heineman: Objection.

By The Court: Sustained.

By Mr. Kahn:

Q. And did you order this letter of credit after you received the credit on Mr. Frank San Roman? A. No.

By Mr. Heineman: Objection.

By The Court: Sustained.

By Mr. Kahn:

Q. This original order that you gave Mr. Todes, you took that from a scrap or a pad of forms that you had in your office? A. Yes.

Q. And everything in that paper, that original order, is in your handwriting with the exception of Mr. Todes' signature; is that right? A. I don't recall whether Todes signed it or not; the order is in my handwriting, and signature; I don't know whether Todes' name is on it or not.

Q. To refresh your recollection, I show you Plaintiff's Exhibit 1; everything on there except Mr. Todes' signature is in your writing, isn't it? A. That is 210 my handwriting, Todes' signature.

Q. It is? A. That is my handwriting.

Q. Then he didn't write any part of it? A. No. He dictated it and I put his name and address on there for reference, that is all.

Q. How long have you personally been in the liquor business? A. All my life, with the exception of during prohibition.

Q. And you have bought merchandise from foreign countries, have you not—liquor?

By Mr. Heineman: Objection.

By The Court: Sustained.

By Mr. Kahn:

Q. Has your firm an importer's permit?

By Mr. Heineman: Objection.

By The Court: Sustained.

By Mr. Kahn:

Q. In connection with this transaction your firm appointed at Laredo, Texas, a customs broker called Jovita Perez, isn't that so?

By Mr. Heineman: That is objected to. I believe it is shown by the records, what happened; the exhibits 211 show the exact transaction.

By Mr. Kahn:

Q. That is the fact, isn't it?

Mr. Heineman: Objected to. The exhibits speak for themselves.

By Mr. Kahn: I don't know what exhibit it is in. If you call my attention to it—I don't think there is any dispute about it.

By Mr. Heineman: There is none.

By Mr. Kahn: Then why object?

By Mr. Heineman: Because we are taking an awful lot of time on unimportant matters. It is in these records. But I have no objection.

By Mr. Kahn:

Q. That is so, isn't it, Jovita Perez?

A. She was the customs broker, and she admitted stuff into the United States.

Q. In your behalf? A. Yes.

Q. There were some extensions of this letter of credit, weren't there? A. That is right.

Q. The time was extended until June 15, as I recall it; is that so, is that your recollection?

212 By Mr. Heineman: I have the document which shows the exact date.

By Mr. Kahn: I am asking for his recollection.

By The Witness:

A. I don't know the exact date of the extension, because they were not ready to ship.

By Mr. Kahn:

Q. And there were several amendments to the letter of credit?

By Mr. Heineman: As to the amendments, this is not the best evidence, your Honor, if there were amendments.

By Mr. Kahn: I am just asking that as a fact, to show the passage of time, that is all.

By The Court: Do you know?

By The Witness: Yes. I said that this morning.

By Mr. Kahn:

Q. Now, before the merchandise—

By The Court: Do you know whether there were any amendments to the letter of credit?

By The Witness: Other than the corrections of the words "in bond"—something about in bond, and that
213 the shipment had to come in full and not in parts.

By Mr. Heineman: Are you speaking of the amend-

ments that went into evidence this morning?

By The Court: Yes.

By The Witness: You mean on the letter of credit?

By The Court: Yes.

By The Witness: There were some minor corrections of the wording of it.

By The Court: Any others than the ones that are in evidence?

By Mr. Kahn: There were specified—

By The Witness: No.

By The Court: I am asking the witness.

By The Witness: I don't recall anything else.

By Mr. Kahn:

Q. Your firm has had issued letters of credit before on foreign shipments?

By Mr. Heineman: That is objected to.

By Mr. Kahn: I want to show his familiarity with this type of transaction.

By The Court: Sustained.

214 By Mr. Kahn: Q. Mr. Lazarus, a day or two after May 10, 1944, do you recall receiving a letter from Frank San Roman dated May 10,—yes, or no.

A. I couldn't say off hand.

Q. To refresh your recolllection, I show you a letter bearing date May 10, 1944—

By Mr. Heineman: Counsel has a general stipulation with me, your Honor, as to the fact that these documents were received at or shortly after the dates they were sent, in the ordinary course of mail. We are trying to get the facts into the record, and I have stipulated that these documents were received by the plaintiff.

By Mr. Kahn: I want to show that the witness has a recollection of specific facts which may bear on the vital issues in this case.

By Mr. Heineman: I think that the stipulation should control, your Honor.

By The Court: What is the answer?

By The Witness: The letter is of no consequence.

By Mr. Kahn: I will withdraw it.

215 (Question withdrawn.)

By The Court: No, the answer is, whether you received it.

By The Witness: I could not recall, no, sir; I may have.

By Mr. Kahn: Of course, it is stipulated that he did receive it.

By The Witness: All right.

By Mr. Kahn: Q. I show you this purported affidavit of Gonzalo Larrea, do you remember receiving that letter of May 10? A. I couldn't say whether I got this one or not. That looks like it is a piece of International Industries, some form of copies.

Q. You have no recollection? A. Those things come in such voluminous lots that I haven't got time, and don't take time to read them.

Q. All right. Do you remember this telegram of May 17 to International Industries—I show it to you.

A. Yes. Well, I mean I assume that is one of the extensions.

Q. Do you recall? A. Yes, the date of the letter of credit was extended once or twice; I would not
216 swear that this is the exact date.

Q. I show you a letter to Jovita Perez of May 27, 1944—

By Mr. Heineman: Show me what you are showing the witness.

By Mr. Kahn: Surely. I thought you were familiar with it.

By Mr. Heineman: Before you answer, may I see it?

By The Witness: What are you asking me?

By Mr. Kahn: Q. Do you recall getting that letter?

By Mr. Heineman: Before you answer may I see it?

By Mr. Kahn: That is covered by the stipulation.

By Mr. Heineman: If it is covered by our agreement, why do you continue to interrogate him?

By Mr. Kahn: Because I want to find out what he personally recalls.

By The Witness: A. These are a lot of International Industries items and I don't know if I got copies
217 of them or not, I could not recall.

By Mr. Kahn: Counsel has stipulated that you did.

By Mr. Heineman: If the Court please—

By The Court: Rely upon the stipulation and put them in.

By The Witness: These letters are endorsed International Industries and I don't know if I got copies of them.

By Mr. Kahn: Q. All right. I just want to finish with three or four on the same line.

Do you recall this special consular certificate?

By Mr. Heineman: If the Court please, apparently counsel is asking this man who is vice-president of the plaintiff for his personal recollection as to whether it was received. It is stipulated that the documents were received by the company of which he is vice-president. And I object to further questioning along this line on the ground that it is irrelevant whether this man personally recalls receiving them or not.

218 By Mr. Kahn: I want to find out his personal recollections.

By The Court: What difference does it make?

By The Witness: I told you I don't read them, no one reads them, they are formalities.

By Mr. Kahn: I move to strike that "they are formalities."

By The Court: Let it stand.

By Mr. Kahn:

Q. Do you recall personally signing this letter bearing your purported signature dated July 24, 1944?

By Mr. Heineman: May I see it?

By The Witness: A. That is my signature.

By Mr. Kahn: Q. Do you remember dictating that letter?

By Mr. Heineman: It is stipulated that it was signed and mailed by Mr. Lazarus, or mailed by the Globe Liquor Company.

By Mr. Kahn: I want to know if he recalls dictating it.

By The Court: He may answer.

By The Witness: A. Yes.

219 By Mr. Kahn: Q. You do recall it? A. Yes.

Q. Do you recall getting this telegram from Gonzalo Larrea, offering to re-filter and re-bottle the merchandise that had been sent? A. Yes.

Q. After you received that first government notice telling you about the shipment being held up—perhaps counsel will stipulate to this if I may confer with him—do you recall receiving two blank forms from the Food and Drug Administration, being an application for conditional release of merchandise detained for reconditioning? A. I don't understand that question.

Q. Now, to refresh your recollection, I showed your counsel a letter which describes—

By Mr. Heineman: I object to showing the witness a document in an entirely different matter.

By Mr. Kahn: It may refresh his recollection.

By Mr. Heineman: It cannot refresh his recollec-
220 tion because it has nothing to do with the Globe Liquor Company—on another shipment.

By Mr. Kahn: I object to counsel's comment.

By the Court: What is it?

By The Witness: That letter was sent to the firm at Baltimore. I had nothing to do with that.

By Mr. Kahn: Q. Does that refresh your recollection that your firm got similar forms? A. I don't think it did.

Q. The same form, wasn't it? A. I don't think it was.

Q. Are you familiar with the Government Regulations that permit merchandise to be conditionally released from bond?

By Mr. Heineman: Objected to.

By the Court: Sustained.

By Mr. Kahn: Q. For reconditioning, aren't you?

By Mr. Heineman: Objected to.

By the Court: Sustained.

By Mr. Kahn: That is all.

221 *Redirect Examination By Mr. Heineman.*

Q. You spoke of the payment of a finder's fee, or, rather, counsel characterized that as a finder's fee of a dollar a case to Mr. Todes, the salesman for International Industries; is that correct? A. Yes.

Q. Did he keep that finder's fee of a dollar a case?

A. No, he returned it afterwards.

Q. Why did he return it to you?

By Mr. Kahn: I object to that.

By Mr. Heineman: Counsel opened the door, your Honor.

By Mr. Kahn: That calls for his mental operation. Why don't you produce Todes' letter?

By Mr. Heineman: Q. Did Mr. Todes tell you why he returned it to you?

By Mr. Kahn: Objected to as hearsay.

By the Court: He may tell us what was said about it.

By Mr. Heineman: Q. What was said and done?
222 A. As soon as I knew that the shipment was in transit I sent Mr. Todes a check for $750; and as soon as I found out that the tequila was not available, or was detained by the Government, I immediately wrote or phoned Mr. Todes, and he immediately sent me his check for $750.

Q. And was that a return of the dollar a case?

A. That is right.

Q. Which counsel has characterized? A. That is right.

Q. As having been paid him as a finder's fee?

A. That is right.

Q. So that in fact Mr. Todes never did keep that dollar a case? A. He kept it until he knew I could not get my tequila, and then of course he wasn't entitled to it.

Q. And then he returned the money? A. Then he returned the money.

Q. You have said that you assumed that International Industries was acting as a broker.

By Mr. Kahn: I object to that. I don't believe he said that.

By the Court: I think he said several times they were acting as broker.

223 By Mr. Heineman: He said "I assume that they were". The record will speak for itself on that.

By Mr. Heineman: Q. Precisely what did you mean by that?

By Mr. Kahn: I object to that, if the Court please.

By the Court: Let him answer.

By the Witness: A. I said I assumed that they were whiskey brokers. He wanted to know whether, if I knew whether they were in the whiskey business or not, and I said I assumed that they were whiskey brokers.

By Mr. Heineman: Q. I am speaking specifically about the term "broker", what did you mean by that when you answered?

By Mr. Kahn: If the Court please, that is objected to.

By the Court: Let him answer.

By Mr. Heineman: Q. What did you mean by the word "broker" in connection with what your estimation was about International Industries? A. Well, pro-
224 bably—

By Mr. Kahn: I object to that question.

By the Court: Overruled.

By Mr. Kahn: As calling for a conclusion of the witness.

By the Court: Overruled.

By the Witness: A. Some brokers operate differently; some of them buy the stuff outright and re-sell it. They are not distillers.

By Mr. Heineman: Q. Is that that you meant?

A. Yes, they are not distillers. Some of them buy it outright and re-sell it, and some sell it on commission.

Q. From whom did you order this tequila?

A. International Industries.

By Mr. Kahn: I object to that. That is a conclusion of the witness, and the so-called order speaks for itself.

By Mr. Heineman: I think we can agree that the orders and letters speak for themselves.

By Mr. Kahn: Oh, no, I am not agreeing with that.

By the Court: Yes, objection sustained.

225 By Mr. Heineman: No further questions of this witness.

Recross Examination by Mr. Kahn.

Q. Mr. Todes does business with you now? A. No, sir.

Q. As a salesman since that particular transaction?

By Mr. Heineman: Objected to as irrelevant.

By the Court: Sustained.

By Mr. Kahn: I want to show the reason for him returning that money, just to carry on in good faith with his contact.

By Mr. Heineman: I will withdraw the objection.

By the Court: Let him answer.

By the Witness: A. Mr. Todes represents a big distillery, and this was purely something on the side, and I assume—I imagine he has discontinued it by now. He has a responsible position.

By Mr. Kahn: Q. He is with Schenley's, is he not?

A. That is right.

226 Q. Doesn't he sell you as the representative of Schenley's?

A. He doesn't call on our territory; he has been transferred; he lives in Syracuse; he lived in Baltimore before.

Q. Did he ever call on you after March, 1944?

A. Yes.

Q. Did he do any further business with you?
A. Yes.
By Mr. Kahn: That is all.
By Mr. Heineman: No further questions at this time of this witness.
By the Court: Step down.
(Witness excused.)

LEE EISEMAN, JR., called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Heineman.

Q. Will you state your name, please? A. Lee Eiseman, Jr.
Q. What is your business or occupation, Mr. Eiseman?
A. I am in the wholesale whiskey business in Maryland.
Q. In Maryland? A. In Maryland.
Q. Did you hear the testimony here today? A. Yes.
Q. In March, 1944, did you order some whiskey from Mr. Gabriel Todes—some Mexican tequila? A. Yes, sir.
Q. Did Mr. Todes tell you whom he was representing?
A. Yes, sir.
Q. Who was he representing? A. International Industries, of Chicago.
Q. How many cases of Mexican tequila did you
228 order from Mr. Todes? A. 750.
Q. Did you pay for that tequila? A. Yes, sir.
Q. Was it shipped to you from Mexico? A. Yes, sir.
Q. Was it shipped to you in the same railroad car that—
By Mr. Kahn: That is admitted.
By Mr. Heineman: Will you stipulate it was shipped in the same railroad car as this shipment?
By Mr. Kahn: Yes.

By Mr. Heineman:
Q. Where was that tequila taken—your tequila taken?
A. I don't know what you mean, "Where was it taken?".
Q. To where was it shipped? A. To Baltimore, a bonded warehouse in Baltimore.

Q. Is that the Government warehouse? A. Government bonded warehouse.

Q. Did you ever get delivery of that tequila?

A. No, sir.

Q. Why not?

229 By Mr. Kahn: That is objected to, if the Court please. It happened in another transaction, and bears no pertinency or relevancy to this transaction.

By Mr. Heineman: I would like to be heard briefly.

By The Court: You may step into the jury room, Ladies and Gentlemen.

(Thereupon the jury retired from the court room, and the following proceedings were had out of the presence and hearing of the jury—)

By Mr. Heineman: If the Court please, this was tequila from the same sellers, sold by the same person, shipped in the same car, from this so-called seller, Mr. Larrea.

Mr. Kahn, both in his opening statement and to this court has said that there is no proof that any substantial proportion of the Globe shipment was adulterated with glass. Here is another lot of 750 cases in that Globe shipment, that was sent to a separate station of the Food and Drug Administration, was inspected by eparate inspectors, and was condemned as being adulterated with glass, and destroyed.

230 I think that that bears definitely on the point of the extent of the adulteration.

By Mr. Kahn: If your Honor please, the proof in the Globe case—which is the case we are trying—is that out of 750 cases, that Mr. Stanfill, according to his affidavit, took four cases at random, which is a fair way of sampling; four cases, that is 48 bottles. And he testified that five out of the forty-eight, according to his affidavit, appeared to have foreign matter in them; that the five bottles were subjected to laboratory tests, and out of those five three—

By Mr. Heineman: Counsel is misstating the evidence, which shows that it was five and they took three to the laboratory—

By Mr. Kahn: All right.

By Mr. Heineman: And that all three were found to have glass.

By Mr. Kahn: Is that it?

By Mr. Heineman: Yes.

By Mr. Kahn: All right. Then we will assume that five out of the forty-eight had foreign matter, which, if that was a fair sample—and I say it is—and if
231 every other bottle had been examined, we have a right to assume that the same proportion would have prevailed, which would have been about 5/48, which is not a substantial part.

By Mr. Heineman: It is more than ten percent.

By Mr. Kahn: Which I say, as a matter of law, is not a substantial part, particularly when the witness Mr. Lazarus admitted that the shipper agreed immediately at his own expense to recondition and refilter the merchandise.

By Mr. Heineman: He did not admit it.

By Mr. Kahn: That is all right—

By Mr. Heineman: But I will not interrupt.

By Mr. Kahn: I thought that he got such a telegram. If he did not I will introduce it.

By Mr. Heineman: You should have introduced it, if it is admissible. Go ahead.

By Mr. Kahn: I didn't heckle you the way you are doing.

By Mr. Heineman: I am sorry if I interrupted you. I apologize.

By Mr. Kahn: The Globe Liquor Company should
232 recover on the strength of their own case. It is unnecessary for them to aggravate the situation by any evidence of a companion suit that should be tried separately on its own merits.

I am perfectly willing to try the two cases together—anything that would shorten the time; and I think I have shortened the time of this case by a number of stipulations that we have entered into.

I think that this evidence here is of no particular probative force, and it would be highly prejudicial to the jury because the evidence will show that the proportions are a little bit different.

By the Court: What is the purpose of this evidence?

By Mr. Heineman: The purpose is to show that there was one lot of 9,000 bottles that went to Globe, and one lot of 9,000 bottles that went to Mandl.

Counsel suggests that it was almost an accident that some of those bottles were found to have glass in them.

And I wish to show that not merely the 9,000 but
233 the whole 18,000 were contaminated.

By the Court: What was the percentage there?

By Mr. Kahn: 9 out of 60.

By the Court: What was found?

By Mr. Kahn: Glass.

By the Court: Let me see the papers.

By Mr. Kahn: The same thing as in the other case (handing documents to the Court).

By the Court: They examined 60 bottles of this shipment and found foreign particles in 9 bottles out of 60. And of the 6 bottles taken of the 9, the other four samples were examined by filtering and found to have particles of glass in each bottle.

By Mr. Heineman: If counsel will stipulate that there was material adulteration of the entire shipment—

By Mr. Kahn: I will do no such thing. What do you want me to do, stipulate to enter judgment?

By the Court: Let me see that other statement.

By Mr. Heineman: Yes (handing document to the
234 Court). Is that what your Honor wanted, the affidavit?

By the Court: Where does it appear that those shipments came together?

By Mr. Heineman: Counsel has stipulated it.

By Mr. Kahn: They came in the same car.

By Mr. Heineman: They came in the same car. I think it is adequately proved but I would like to batten it down.

By the Court: Well, if these were two separate cars of grain where an inspector examined the whole car as it came through a chute, I wouldn't see any reason for evidence of this kind. But where the examination is by sampling—

By Mr. Heineman: And by different inspectors.

By the Court: (Continuing)—and the two shipments come from the same shipper in Mexico, and they are the same material, I think the evidence has probative force.

By Mr. Kahn: Except that the proportions are slightly different.

By the Court: How slightly different?

By Mr. Kahn: Let us assume that they are the same. Suppose we had five people all buying out of the same
235 car, and they bring all five here, the cumulative proof of all five, as bare facts, isn't any greater.

By the Court: It negatives the possibility that it is just a bottle here and there.

By Mr. Heineman: Precisely.

By the Court: It negatives that possibility.

It shows that out of ten percent, out of the sixty bottles, nine were found to have foreign material in. And they took six of those, and two were kept, and they examined and found out that all four from the six had glass.

By Mr. Kahn: They took nine out of the sixty.

By the Court: Nine out of the sixty and found foreign material.

By Mr. Heineman: That makes the sample that much wider.

By the Court: That makes the sample that much wider.

By Mr. Kahn: I think it is prejudicial; that is my principal reason for objecting, because the proportions are not the same.

By the Court: It would be prejudicial if it did
236 not have probative force. If the examiner had happened to examine every bottle, then there would be absolutely no reason for even referring to another shipment.

By Mr. Heineman: That is exactly right.

By Mr. Kahn: Then you get down to this basic fact: Since the ten percent seems to be rather a rule of thumb here, which we can both adopt for purposes of illustrative argument, is the presence of ten percent—or, if ten percent of the shipment is adulterated, does that give the buyer the right to reject the entire shipment?

By Mr. Heineman: That is a matter of law.

By the Court: I don't know. But if you were buying—I assume you buy whiskey—if you were buying a case of whiskey would you want even one bottle to have broken glass in it?

By Mr. Kahn: I do not buy whiskey.

By Mr. Heineman: If a dealer delivered a case of whiskey to you in Chicago, and the first bottle had glass in it, you would send it back.

By Mr. Kahn: From what I know of the Scotch
237 situation it is extremely doubtful if he gets any.

By Mr. Heineman: I am asking you as an expert.

By Mr. Kahn: I am just using my powers of observation.

Here was a tight market. They wanted anything that had alcohol in it when they bought it. But when two or three months went by and the bottom dropped out they seized upon any excuse at all to reject it.

By Mr. Heineman: I think with ten percent having sharp splinters of glass in it is a very good reason.

By Mr. Kahn: One percent is pretty good.

By the Court: What are you going to do, open up every bottle and examine it?

Objection overruled. I think it has probative force because the examination was by sample. The shipments came from the same place, from the same shipper in Mexico, and of the same material.

Bring in the jury.

(Thereupon the jury resumed their places in the
238 jury box, and the following further proceedings were had in the presence and hearing of the jury:—)

By the Court: Ladies and Gentlemen, this witness on the stand is testifying concerning another shipment, one not in issue in this case. The evidence—the Court rules—of this witness is admissible only on the question of the fairness of the sampling, in the case before you, and not otherwise, and must not be considered by you on any other question, just simply on the question of the fairness of the sampling of the shipment which we are now concerned with.

By Mr. Heineman: Will you read the pending question, Mr. Reporter:

(The record as above recorded was read by the reporter, as follows:

"Q. Did you ever get delivery of that tequila?
"A. No, sir.
"Q. Why not?")

By Mr. Heineman:

Q. Will you state why not, please? A. We were
239 not allowed to; it was detained by the Federal Government.

Q. Why was it detained?

By Mr. Kahn: I object to that. He can tell by whom.

By Mr. Heineman: He has said, by the United States Government.

By Mr. Heineman:

Q. Do you know why it was detained? A. Yes.

Q. Would you state why it was detained?

By Mr. Kahn: That is objected to, as calling for his conclusion.

By the Court: Sustained.

(Counsel for the parties conferred privately.)

By Mr. Kahn: We are trying to stipulate on something to save the time of the Court.

By the Court: Very well.

(Counsel further conferred privately.)

By Mr. Heineman: It is stipulated as a fact that the shipment was detained by the United States Government because it was found to be "Adulterated: Within
240 the meaning of Section 402(a) of the Food, Drug and Cosmetic Act since it bears or contains a poisonous or deleterious substance (glass particles) which may render it injurious to health."

That is stipulated?

By Mr. Kahn: It is stipulated, subject to my objection as to the competency.

By the Court: Yes.

By Mr. Kahn: That this is a conclusion of an official.

By the Court: Yes or no?

By Mr. Kahn: Yes.

By Mr. Heineman: I object to arguing it. The Court has ruled.

By Mr. Kahn: I am stating the grounds of my objection for the record.

By Mr. Heineman: In accordance with your Honor's ruling that this evidence is to be taken only as showing the fairness of the sampling, it is further stipulated that this was the method of sampling followed with respect to this case, with respect to the shipment with respect to which Mr. Eiseman has testified.

241 By Mr. Kahn: The stipulation as to the existence of those facts is subject to objection as to competency.

By the Court: I understand.

By Mr. Kahn: And the relevancy of these two paragraphs, and on the further ground that it is prejudicial to the defendant.

By the Court: Very well. Overruled.

By Mr. Heineman: (Reading)

"On July 1, 1944, Analyst Fredric K. Killingsworth of the Baltimore station, Food and Drug Administration, examined 60 bottles from this shipment by candling, and noted foreign particles in nine bottles out of the sixty." That has reference to the shipment about which Mr. Eiseman testified.

"Six of the nine bottles were taken as a sample, and Notice of Samples Taken (Customs Form 6521) was issued on July 1, 1944, to the importer of record thru Samuel Shapiro & Co., Inc., Baltimore Md.

"Of the six bottles taken as a sample, Mr. Killingsworth placed two unopened in our sample room where they have since remained under lock and key. The
242 other four bottles of the sample we examined in our laboratory by filtering. He reported finding sharp splinters of glass in each bottle, varying in size and ranging in number from a minimum of one to a maximum of seventeen pieces per bottle. His report was made on July 1, 1944."

No further questions.

Cross Examination by Mr. Kahn.

Q. Mr. Eiseman, your firm bought 750 cases of tequila from Mr. Todes, the salesman? A. Will you repeat the question, please?

Q. I say, your firm bought 750 cases of tequila from Mr. Todes, the salesman, during March of 1944? A. Yes.

Q. You have known Gabriel Todes all your life, haven't you?

By Mr. Heineman: Objected to as irrelevant?

By the Court: Sustained.

By Mr. Heineman: On the Globe proof.

By the Court: Sustained.

By Mr. Kahn:

243 Q. Did you give Mr. Todes a written order?

By Mr. Heineman: Objected to; for the purpose as to which this evidence has been introduced it is irrelevant.

By the Court: Sustained.

By Mr. Kahn:

Q. Wasn't your deal with Mr. Todes that the order you gave him was subject to acceptance?

By Mr. Heineman: Objected to.

By the Court: Sustained.

By Mr. Kahn:

Q. Wait a minute: Confirmation by the shipper.

By the Court: Sustained. The evidence was admitted for only one purpose, the question of the fairness of the sample.

By Mr. Kahn:

Q. Mr. Eiseman, do you recall getting a detention notice from the Food and Drug Administration covering this shipment, and saying it was being detained?

By Mr. Heineman: Objected to, on the same ground.

By the Court: Sustained.

By Mr. Kahn:

Q. Do you recall getting a blank form of applica-
244 tion for the conditional release of the merchandise for reconditioning.

By Mr. Heineman: Objected to on the same ground.

By the Court: Sustained.

By Mr. Kahn:

Q. Do you recall getting a telegram from Gonzalo A. Larrea offering to recondition and refilter the merchandise at his expense?

By Mr. Heineman: Objected to on the same ground.

By the Court: Sustained.

By Mr. Kahn: That is all.

By Mr. Heineman: You may step down.

(Witness excused.)

By Mr. Heineman: Plaintiff rests, your Honor.

And Thereupon the Plaintiff Rested Its Case.

By Mr. Kahn: I should like to make an oral motion, your Honor.

By the Court: Do you wish to argue it?

By Mr. Kahn: For a few minutes.

By the Court: You may step into the jury room,
245 Ladies and Gentlemen.

(And thereupon the jury retired from the court room, and the following proceedings were had out of the presence and hearing of the jury:—)

By Mr. Kahn: Defendants desire to make an oral motion that the Court instruct the jury to find the issues for the defendants, for the following reasons:

There is no proof here that the moneys that the Globe Liquor Company paid, or any part thereof, were paid the defendant International Industries.

The original order, Plaintiff's Exhibit 1, is a mere request; it was not a contract, it was signed only by the buyer, and is a request or proposal—it was an offer to purchase.

Mr. Lazarus, who is a trained business man in this line of business— been in it all his life, he has handled letters of credit; obviously there is no great mystery, and he admitted on the stand that he regarded International Industries here merely as a broker.

He admits—and it is admitted here, it is undisputed, that the shipment came directly from Mexico. It was never handled in Chicago. International Industries are not in the liquor business, and never represented
246 themselves to be.

By Mr. Heineman: There is no evidence of that, if it were material.

By Mr. Kahn: Just make notes of what I say and do not interrupt me, please, and I will give you the same courtesy.

Accompanying this original offer or proposal was a form of letter of credit. There is nothing mysterious about that. Letters of credit, we know as lawyers are strictly construed.

If whoever is responsible for their payment is presented with documents in due form it is the duty of a party liable to pay them.

In this particular instance the letter of credit was made originally to International Industries, and the assignment was permitted, which immediately informed Globe that International Industries could assign this particular letter of credit.

Note the specific conditions of this letter of credit, your Honor, even if we assume for purposes of the argument—

By the Court: I read it.

By Mr. Kahn: It is expressly made. And of course this letter of credit is part of what I consider to be the oral contract in this case, in order for the Globe
247 Liquor Company to make sure that they were going to get this merchandise—and they were anxious to get it because of the tight market—and it was stipulated that Mexican shipper's invoices were to be procured.

In other words, here is privity directed between the

Gentlemen We sent you two packages by air mail in connection with the 750 cases of tequila purchased through International Industries:".

There you have an admission that they knew that they were dealing with a broker, they were not dealing with International as principal.

Mr. Todes' letter of the 24th, he is nothing more than a salesman, he hasn't got any authority to bind anybody —taking orders.

By the Court: Let me have your best case.

By Mr. Heineman: Yes.

By Mr. Kahn: What is it?

By Mr. Heineman: In connection with the parol evidence rule?

By the Court: Yes.

By Mr. Heineman: Loeb against Flannery.

By Mr. Kahn: The citation?

By Mr. Heineman: If your Honor will take the statement from an inter-office memorandum—148 Ill. App. 471 and other cases both before and after that. And there is also Wigmore cited there (handing documents to the Court).

By the Court: Take a short recess. And pick out 267 the two or three that you regard as the best statement of the rule in Illinois.

By Mr. Heineman: Yes, your Honor. Do you wish it on both the partially disclosed principal and the varying?

By Mr. Kahn: There is no question about the principal disclosed.

By Mr. Heineman: Pardon me.

By the Court: I am just thinking now in respect of parol evidence.

By Mr. Heineman: In effect they go hand in hand. I will get the cases.

By the Court: About the three best cases on each point.

By Mr. Heineman: Yes, your Honor.

(After a short recess, the following:—)

(Mr. Kahn handed a book to the Court.)

By Mr. Kahn: In the case that your Honor has before you, there was a complete, plain unambiguous contract, that Flannery got a thousand dollers to be returned on

ten days notice. It is plain on its face. Naturally it was not susceptible to contradiction. And that is obvious,
268 that the thousand dollars was paid on the strength of that receipt and contract, which was completed by itself. In that case Flannery tried to substitute another party saying that he was not responsible for the money. The contract was complete right on its face, and he got the money and gave the receipt at the time that he got the money.

By the Court: I have seen the Loeb case. Now what is the next case?

By Mr. Heineman: Are you speaking to me?

By the Court: Yes.

By Mr. Heineman: On that first point of varying the written contract, I should like to show your Honor Plaintiff's Exhibit 5.

Counsel has raised the point here about whether the salesman had the power to accept orders. But Plaintiff's Exhibit 5 is a letter from the defendant here—not from the salesman, making formal changes in the letter of credit, and saying again that the contract is acceptable, and receipt of the letter of credit is acknowledged, and suggests two formal changes.

It says the credit is acceptable, and by the "credit" referring to the two prior documents—and that with the subsequent telegram which your Honor has before
269 you. And then we have the amendment that he suggests there.

It is too clear for any words that we had a contract in those prior documents; and that letter clearly so states.

By Mr. Kahn: There is no acceptance of any order. It is merely a suggestion to the buyer that if they want to get the merchandise here the letter of credit must be amended in certain particulars. There is no undertaking on the part of International to accept any orders.

By Mr. Heineman: Shipping had nothing to do with it. For example, if they had failed utterly to get shipment for any reason at all we could have recovered from International Industries on a suit for damages for failure to deliver.

By Mr. Kahn: I don't think so; I don't know of any acceptance.

By Mr. Heineman: Why, of course.

By Mr. Kahn: The letter of credit—they were dealing with the seller in Mexico.

By Mr. Heineman: Not the seller; you have been saying "shipper".

By Mr. Kahn: All right, the shipper.

By Mr. Heineman: There is a great difference.

270 We had no way of knowing who the owner of the merchandise was. They bought it in Mexico.

By Mr. Kahn: They didn't buy it. They simply took an order and sent it down to Mexico. Mexico accepted the order for shipment. All they got out of it was brokerage—a small amount.

By Mr. Heineman: We have no way of knowing what they were going to do with the money.

By Mr. Kahn: They never got the money.

By Mr. Heineman: We assume that it wasn't all profit, that the merchandise cost something.

By Mr. Kahn: If your Honor please, that clears the thing—

By Mr. Heineman: Pardon me. I would like to finish my argument. You have been talking for an hour or an hour and a half; and if you don't mind, may I stand here, please?

By Mr. Kahn: Counsel handed up a case that is the same as the Flannery case.

By Mr. Heineman: May I please address the Court?

By Mr. Kahn: I am sorry to differ. But that is where a party who gets the merchandise and agrees to return it—that is different. No question about the liability.

What is the citation?

271 By Mr. Heineman: The citation of the case which I am now handing to the Court is Vail v. Northwestern Life Insurance Company, 192 Ill. 567 (handing a book to the Court). And I marked Subsection 3 specifically, your Honor, the fact that the agency did not appear.

By the Court: Well, I will hear from you further in the morning.

The burden is on you, Mr. Kahn, at the moment.

By Mr. Kahn: Thank you for your consideration.

By Mr. Heineman: May I also in the morning before Mr. Kahn is heard address myself to the question of partial disclosure in Illinois?

By Mr. Kahn: I will state that under the Illinois law there is no such thing as partial disclosure.

By Mr. Heineman: In other words, you concede that under the Illinois law if the unknown principal is not known at the time the contract is made—

By Mr. Kahn: I don't say that.

By Mr. Heineman: Then I want to argue that and show it to the Court.

Thank you, your Honor, for your consideration.

By the Court: All right.

By Mr. Kahn: If the Court please, I have an un-
272 usual request: I was called into an injunction matter before Judge McGoorty, upon which depends the continuance of the publication of "The Chicago Independent," which is that Negro newspaper, the leading Negro newspaper in this community, and that motion is coming up tomorrow morning and I simply should be there to protect the rights of my client. Can I be excused until ten-thirty?

By The Court: You may be excused until ten-thirty but at that time we will go ahead.

By Mr. Kahn: I will simply have to be here at ten-thirty, that is all.

(Whereupon an adjournment herein was taken until the following day, March 14, 1946, at the hour of 10:30 o'clock a. m.)

273 • • (Civil Action No. 45 C 120) • •

Met pursuant to adjournment.

Present: Mr. Heineman.
Mr. Kahn.

And thereupon the following further proceedings were had herein:—

By the Court: Proceed.

(And thereupon the following further proceedings were had herein out of the presence and hearing of the jury:—)

By Mr. Kahn: Your Honor said last night that the burden was on me on this point.

By the Court: I just wanted to know your statements on the argument.

By Mr. Heineman: Passing the question of the written contract, and varying that by parol evidence, I would

buyer in the United States and the shipper in Mexico, not only is his own commercial invoices, but the consular invoice, the insurance certificate and the original bill of lading issued to the shipper and endorsed by him in blank.

In other words, here is evidence of a contract whereby there was direct privity between the contract shipper in Mexico and the buyer here in the United States, the plaintiff.

So on the documents the plaintiff itself has notice. There was a direct privity of contract between the shipper, the principal, and the buyer here, the plaintiff.

When drafts were drawn for the payment of this merchandise the money was paid in effect to The First National Bank of Chicago, not to International Industries.

The letter of credit itself specifically provides that the drafts were payable at sight for full invoice value
248 at The First National Bank of Chicago.

The money was not handled by International Industries. The money was handled by The First National Bank of Chicago, who acted in a sense as the clearing house here.

Now, it is obvious, that is, it is a fair inference from the facts thus far, that the foreign shipper in Mexico would never have shipped the merchandise until the following things occurred:

First, that a letter of credit was furnished, that when the title papers, the shipping documents would reach Chicago, the First National Bank, the Chase letter of credit would be honored.

And second, which is more important, is the unescapable inference that the shipper in Mexico would not have shipped the goods, or deprived himself of title to the goods by means of this invoice and bill of lading unless the First National in turn had in advance agreed to remit the proceeds of that letter of credit to the Mexican shipper.

It is admitted here by the witness that Larrea, the shipper, immediately upon learning of the detention by the Government, agreed to recondition and refilter the merchandise at his own expense.
249 That offer was rejected by the buyer.

The buyer here had full opportunity to inspect this merchandise.

The complaint shows that they were notified when the

shipment left Mexico, on May 22, 1944. They were on the lookout for it,

They were trained in the liquor business. Mr. Lazarus has been in the liquor business all his life.

He could easily have arranged for an inspection of this merchandise even though it was in bond.

And the last point I make is that before any liability was incurred on the part of the buyer in this case in any way whatsoever, and before the Chase National incurred any liability under its letter of credit, by the letter of May 10, 1944, and the accompanying affidavit, which was before the shipment even left Mexico, Globe Liquor Company, was informed that the name of the shipper, the principal, was Gonzalo A. Larrea, of Mexico City; and the accompanying affidavit by Larrea gave Globe all information to establish its OPA ceiling prices. And if we hadn't sold this tequila on the $10.50 a case, why immediately following, when Globe received that information, if it didn't want to do business with Larrea it would have immediately repudiated the transaction, because 250 its original order was never accepted and it could have withdrawn it at any time because that original piece of paper was never accepted.

So that you have all the elements here:

You have a disclosed principal; the identity of the principal is disclosed, and any liability attaching under the original order, or the letter of credit—and that is May 10, 1944, and the merchandise did not leave Mexico until May 22, and it was not until June that the drafts were presented; and in addition to that only a small portion of the merchandise is shown to have been adulterated; so that I think that the remedy here on the part of the buyer, the plaintiff, is to seek recourse first against Larrea.

And as Mr. Heineman himself suggested, if the banks paid these drafts before the merchandise was released in bond the banks should be liable.

International here is a small outfit of good repute who acted as brokers. No pretense about its connection with this deal. Mr. Lazarus admitted they were brokers.

Obviously they only ultimately received a small portion of these funds by way of commission. And on that understanding it is manifestly unfair to saddle the defendants with any attempted liability in this case.

251 And I think on the showing I have made that we are entitled to a directed verdict.

By the Court: Let me see the order.

By Mr. Heineman: If your Honor please, it is not a question of an order, it is Exhibits 1, 2 and 3 which comprise the contract in the view of the plaintiff.

By the Court: Let me see them.

By Mr. Heineman: It is these three documents.

(Handing documents to the Court.)

By Mr. Kahn: Here is the letter of credit, too.

By Mr. Heineman: His Honor has read the letter of credit.

By the Court: Let me see the documents.

(Documents handed to the Court.)

By the Court: Motion denied.

By Mr. Heineman: May we dispose of a preliminary matter with respect to Defendants' case, your Honor, so as to avoid the necessity for sending the jury out?

By the Court: Yes.

By Mr. Heineman: Because we did not regard it as a part of our primary case, which we think has clearly been made out, we did not put in a mass of evidence showing the course of discussion and correspondence
252 between the parties with respect to this shipment.

And counsel is going to put in, or attempt to put in evidence correspondence before these written documents—this written contract in our view, was prepared, and such matters as conversations with Mr. Todes, about what Mr. Todes said to the plaintiff, and what he did not say; and also correspondence after the contract was entered into. The contract was entered into in March, and on May 10 for the first time the name of Gonzalo A. Larrea was mentioned.

And I am going to object to that on the ground—to all of this involved and rather voluminous matter, on the ground that this is a very simple case of the defendants contracting with the plaintiff, and without disclosing the principal.

First of all counsel has constantly confused "shipper" and "seller".

It is true that these documents refer to someone as the shipper. But there is no indication who he was, or

what his relationship was to anyone other than that he was the man who put the merchandise on the cars in Mexico.

And I have gone to the trouble of having counsel's opening statement written up in which he made a binding admission of his parties: (reading)

253 "Although at the time Mr. Todes did not state the name of the shipper, the reason is obvious. Because the demand for liquor was so strong in behalf of purchasers that had they known the name of the shipper, and his name and location they could have dealt directly with the shipper, and in that way would obviate and deprive my clients from the small commission they were to earn."

"Because the demand for liquor was so strong in behalf of purchasers"—meaning Globe.

"that had they known the name of the shipper"—not the seller, the shipper.

What does that mean? It means that their salesman, Mr. San Roman, instructed his salesman that the name of the alleged seller was not to be disclosed to the buyer when the contract was entered into—and there is no question in my mind that this is a binding contract for which damages could be sought if the buyer had not purchased this irrevocable letter of credit.

But Mr. San Roman instructed his salesman, "You may not tell them the name". And the name was not given.

So even assuming that the plaintiff knew that the
254 defendants were acting as agent for someone the law is very clear—and I have ample cases to support my position—if the name is not disclosed at the time of the making of the contract no subsequent disclosure can affect the contract.

It is the case of an agent acting for an undisclosed principal. If partially disclosed before you may bind both the agent and the principal, if you can catch the principal.

I don't know whether your Honor would like to see authorities—it is Hornbrook law, that where there is a partially disclosed principal one may bind the agent—and by counsel's own admission, which under the rule both in the Federal Courts and in the State Courts in Illinois is binding, the name of the principal was not disclosed at the time of the making the contract, for reasons.

By the Court: I understand.

By Mr. Heineman: Yes.

So I think we may as well thresh that out now, because there will be objection.

And frankly, I have seen the evidence which counsel proposes to put in. And in my view it is all incompetent as tending to vary the effect of a written contract, and on the ground that any attempt to show that knowledge
255 of the principal was disclosed after the contract was made is invalid.

By Mr. Kahn: In response to that, if you will glance at the—

By Mr. Heineman: I asked his Honor whether he wished my authorities.

By the Court: I will hear from you.

By Mr. Kahn: Would your Honor be good enough to look at my brief as I go along here as it will save some time of the Court.

When you analyze Plaintiff's Exhibit 1, it is signed only by Lazarus. It is all in Lazarus' handwriting, and nothing more than a mere memorandum or request or an offer to purchase or a proposal to purchase.

All of the terms of the proposed sale beyond the provisions of the letter of credit are omitted. There are no details. There are no terms. No details of the time of shipment. No details. A sixty-day letter of credit, which might give some inkling.

The word "assigned" is omitted, that the letter of credit had been assigned.

And the cases are legion under my Point 1, that a mere piece of paper of the sort is nothing more than an offer to buy. And until that piece of paper is accepted by
256 the seller it has the dignity of nothing else but a piece of paper to be withdrawn at any time.

And I have a list there on the first page, of my points and authorities.

By the Court: Suppose the order was just a mere order, that the middleman Mr. Todes wrote a letter.

Let's see those papers.

(Documents handed to the Court.)

By Mr. Kahn: Now, here is this letter in which he says:

"This will confirm our telephone conversation of this morning relative to your order".

There is no contract there.

By the Court: No, on 3-16-44—
By Mr. Kahn: Is what we call the order.
By the Court: You call that an order or memorandum?
By Mr. Kahn: Yes, or an offer to sell.
By the Court:
"This will confirm our telephone conversation of this morning relative to your order of Mariachi Tequila Gold, wherein the price for the Gold is $10.75, which is 25 cents more than the White, and which was agreeable to
257 you."
By Mr. Kahn: And in the second paragraph he is merely asking for confirmation.

By the Court:
"Will you please forward to me your confirmation on this price, as I have already advised International Industries to cable your order to Mexico."
By Mr. Heineman: That is an acceptance in that paragraph.
By Mr. Kahn: No, it isn't, at all.

By Mr. Heineman:
"as I have already advised International Industries to cable your order to Mexico".

By the Court:
"as I have already advised International Industries to cable your order to Mexico"
By Mr. Kahn: But it is up to Mexico to say whether they will accept it.
By the Court: Let me read:
"Please execute your letter of credit exactly in accordance with the form which I left with you, with the exception of changing the price from $10.50 to $10.75, and substituting your own customs broker in the place of
258 Jovita Perez, if you so desire.
"I wish to take this opportunity to thank you again for your patronage.
"Kindest regards Gabriel H. Todes.
"cc: International Industries"—that is San Roman.
Now, this is what he said on March 27:
"This confirms our order placed with your last week for 750 cases of Mariachi Tequila Gold at $10.75 f. o. b. Laredo, Texas. We have put through the letter of credit in accordance with the specimen you left here, but I have changed to tequila where you had the word vodka.

"Be sure to instruct the International Industries that these cases cannot come into Delaware without the Delaware state stickers which will be sent to any address that is specified when they notify us that the shipment is ready to come forward.

"These stickers are only sent after we have paid the state tax, so that you should wire us in ample time for us to pay the tax and have these stickers forwarded—one to be put on each case."

By Mr. Heineman: And the letter of credit.

259 By Mr. Kahn: It is still unilateral. The letter of credit stipulates shipper's invoice.

By Mr. Heineman: There is no question it was coming from Mexico.

By Mr. Kahn: It means that they are buying from the shipper.

By Mr. Heineman: No.

By the Court: As far as this goes, I don't see why they should be allowed to vary the terms of this contract by oral evidence.

By Mr. Kahn: If the Court please, even the case in the 296 App. 245 where both parties signed the same piece of paper or memorandum, it was incomplete.

By the Court: I wonder if you can get me that case.

By Mr. Kahn: And will you bring the 56 N. W., please?

By the Court: The 56 N. W. isn't here.

By Mr. Kahn: It isn't here?

By The Court: No. What case is that?

By Mr. Kahn: It is one of those western States, either Iowa or Kansas where an almost similar memorandum was held the same way. And in that case you have got a paper signed by two people, the buyer and the seller with the terms incomplete.

By the Court: I think you are right when you consider the paper 3-16-44, but when you consider that

260 with the paper of March 24, 1944, and March 27, 1944, and March 29, 1944, then what?

By Mr. Kahn: Todes presumably hasn't any authority. He merely takes the order. He says, "I have got your order. Confirm the price". They are still negotiating.

By Mr. Heineman: He left the terms of the letter of credit with him and said, "Fill it out."

By Mr. Kahn: All right.

"I have already advised International Industries to cable your order to Mexico".

Your Honor, the jury isn't here: In this Mandl case Mr. Eiseman signed a paper where he wanted to be sure he was dealing with the Mexican shipper. And his order says, "Subject to confirmation and acceptance by the shipper".

By Mr. Heineman: And that was put in.

By Mr. Kahn: That is in writing. That is how anxious they were to deal with the Mexican shipper. They didn't care anything about International. International knew a source in Mexico where to buy this. These are mere unilateral offers.

By Mr. Heineman: I would like to have seen what would have happened if we had not been willing to
261 pay.

By Mr. Kahn: No liability, there was never any acceptance.

By Mr. Heineman: We would have had a lawsuit slapped on us so fast.

Why did you insist on an irrevocable letter of credit?

By Mr. Kahn: What does that mean: Mexican shipper? No liability until the Mexican shipper's invoice appears? It just confirms that it wasn't forced on you. You were dealing with the Mexican shipper.

You haven't got the Northwestern Reports?

By the Court: Well, we can get it. Get me the 56 Northwestern.

By Mr. Kahn: It is a very interesting case.

In that same volume is another case, page 221.

By Mr. Heineman: Is that a principal and agent case?

By Mr. Kahn: Yes.

By Mr. Heineman: There is a lot of distinction between cases.

By Mr. Kahn: You can argue it.

By Mr. Heineman: I will.

By the Court: Get me 334 Ill. and 259 Ill. App.

By Mr. Kahn: Your Honor, would you glance
262 at what I consider the leading case, and that is the 56 Northwestern?

By the Court: Well—

By Mr. Kahn: It is followed in the 232 Northwestern. And here is a federal case.

By the Court: Where is it?

By Mr. Kahn: The McCormick case, 56 Northwestern, page 683.

By the Court: Why should I have to go over to Iowa?

By Mr. Heineman: We have a number of decisions in Illinois, not to mention leading text writers.

By Mr. Kahn: In this case there was a contract signed by two people and that was held to be incomplete; the man was nothing more than a salesman and he could not bind anybody, just took orders. He had authority to take orders and nothing else.

By Mr. Heineman: That was not the admission.

By Mr. Kahn: And in this Mandl case they made it subject to confirmation.

By the Court: "Sufficient unto the day is the evil thereof". We won't worry about that until we get to it. Go ahead.

By Mr. Kahn: May I also argue this point—Point 3 in my brief, that the identity of the shipper was
263 disclosed to the buyer before there was any liability created under the buyer's letter of credit?

Letters of credit are the things here that they bought. And that first piece of paper was nothing more than an order.

The cases hold that the disclosure of the principal's identity need not be made at the inception of the transaction. It is sufficient if it is made before liabilities are incurred on either side.

Meacham on Agency Section 1414.

3 Corpus Juris 125.

And three cases cited under Point 3.

And then Meacham again, and the Restatement of the Law and 3 Corpus Juris 125 hold that if the fact of the agency is known—and Mr. Lazarus admitted it— in other words here the buyer is so anxious to get the merchandise that they say, "We don't care who the seller is, we want the merchandise, and we won't bother International Industries or hold them liable as long as we get the merchandise".

By Mr. Heineman: Objected to. There isn't anything in this case to suggest that.

By Mr. Kahn: There will be. You are forgetting the deposition of Mr. Todes, which is on file here.

That is replete with that sort of an understanding
264 with Mr. Lazarus, that he said, "Now see here, the International are in this deal. They are brokers.

They know where this can be bought. They are not liquor dealers. They are not importers. They don't handle the merchandise. But I think we can take your order and give it to them and they will send it to Mexico. But they are not to be liable for the quality or for the time of shipment".

And the deposition is to the effect that Mr. Lazarus agreed to it under those terms.

If that was the arrangement as to that the identity of the principal does not ever have to be disclosed. And you have got three authorities for that.

By Mr. Heineman: But none of them from Illinois.

By Mr. Kahn: What is the difference? That is childish.

There is the Restatement, that is pretty good.

There is Meacham—and there is nothing better.

And then there is the Illinois Supreme Court case 336 Ill. 542—and I am quoting from the opinion at page 526

265 Where an agent in making a contract discloses his agency and the name of his principal and where the party dealing with the agent knows that the agent is acting as agent in making the contract the agent is not liable on the contract unless he agrees to be personally liable. So we come within the purview of that disjunctive clause.

Plaintiff's Exhibit 1 is this piece of paper. It is an order subject to withdrawal at any time.

The letter of credit is the evidence of the promise to pay but it is condition.

By the Court: Let me see your best case, Mr. Heineman, on the proposition that parol evidence is not admissible.

By Mr. Heineman: I have several.

By Mr. Kahn: Give me the citation.

By Mr. Heineman: I have them all here. I just don't know which is the best.

By Mr. Kahn: Could I call your Honor's attention to just one more point?

By the Court: Yes.

By Mr. Kahn: Exhibit Q to the affdavit for summary judgment, which I will introduce in due course, is a letter of Mr. Lazarus to

266 "Pine Needle de Mexico, S. de R. 1
Cerrada Rio de Janiero 9, Mexico, D F Mexico

like to discuss the question in Illinois from the stand-
274 point based on this state of facts that the defend-
ants have said that they could show that at the time of the making of the contract the plaintiff was aware that the defendants were agents, but were not aware—by admission of counsel for defendants— of the name of the principal; in other words, the case commonly referred to as the case of a partially disclosed principal.

The law in Illinois is so well settled that in the case of a partially disclosed principal the agent may be personally bound, as to require no citation of authority.

The leading case is Annes v. Carroll Graham Hoffman, in the 336 Ill. 542, which on its facts is even stronger for defendants than this case.

In that case the plaintiff went to an insurance agency in Chicago and wanted an insurance policy on a diamond ring. The insurance agency issued a binder, binding Lloyds of London to insure the ring, the policy to be issued as soon as it came from London.

Before the policy came the ring was lost.

The plaintiff sued the agency personally.

The agency defended on the ground that the agents were not bound but that Lloyds of London were
275 bound.

The proof showed that Lloyds of London was an underwriting insurance firm in London; that under their practice one did not know until the policy came to Chicago which group of underwriters at London were bound because the practice was to select the names of the accepting underwriters in London.

And the Supreme Court held under the circumstances that it was a case of a partially disclosed principal, and said that under the circumstances at the time of the making of the contract the plaintiff could not possibly have known whom the principals were. Even the defendants said that they were acting as agents and that Lloyds of London would be bound.

And they held the agent personally.

And there is an extended discussion of the law on the point of a partially disclosed principal in that case. And it has been cited down to date as representing the law in the State of Illinois on partially principals.

By Mr. Kahn: That is the law. I concede that that is the law on that particular point, as stated by counsel.

By Mr. Heineman: I mean, there are other cases.

But in view of that one, and counsel's concession,
276 there is no need, there is no point of laboring the point further.

It makes clear, however, why the plaintiff will object to offers of evidence showing that at some date after the making of the contract the name of the shipper was mentioned.

Our rebuttal will show that by an exchange of correspondence, the defendants mentioned the names of several Mexican firms or groups, and that they referred to others as "our people in Mexico", and that we had no way of telling which one of several firms they were actually referring to as the seller.

But I do not believe it will be necessary to go into that rebuttal, however, because in our view under this decision that evidence is incompetent.

By Mr. Kahn: Were you waiting for me, your Honor? I am sorry.

By the Court: Whenever you are ready.

By Mr. Kahn: I thought your Honor was reading, and I didn't want to interrupt you.

Counsel has argued two points that are separate and distinct.

First, he argued that the amendments of the original letter, Todes' letter asking for confirmation, and the
277 letter of International suggesting changes in the letter of credit, that those were a complete contract in writing which could not be varied by parol evidence under the rule.

I would rather pass that for the moment and get to the point that he just discussed.

Illinois does not recognize the rule as to partially disclosed agents and so on. That is one part of the doctrine of law that is applicable to the situation here.

Every one of the cases that he cited—and I examined them all this morning and last night, including a case that I myself took to the Appellate Court for the Irving Trust Company—and I think I am familiar with the principle of law involved, presents an entirely different situation—each one of those cases.

In the Lloyds case, the memorandum on its face was a complete unambiguous statement with respect to the parties. What the defendants sought to do in that case was to substitute a new party, and that the court said could not be done.

That is not our case.

In our case, if the deposition of Mr. Todes is permitted to be read—and I think—I know your Honor always wants to get at the truth of the situation, and the
278 ends of justice are always best served by finding out exactly what did happen; Todes, absolutely disinterested, a friend of these men—the deposition will show he was a lifelong friend of Lee Eiseman, of the Mandl Company, and a friend of Mort Lazarus for about five years, and he returned his commission because he didn't want to lose the good will of those customers.

Todes testified in his deposition that he specifically told Mr. Lazarus, "International is a broker and is not to be liable on the shipment or on the quality".

And Mr. Lazarus admitted that he regarded International as a broker.

And at the time that order was given—and that is not a contract—he merely was the agent, and there was a disclosure of the principal's name, as I said in my opening statement.

There was a letter of credit given to insure payment.

But it is the law—and I have the authorities right here—unfortunately there is nothing in Illinois directly on the point.

But in Meacham on the Law of Agency—which is still a standard and an outstanding authority on the prin-
279 ciples of agency, Section 1414, reading from the 1914 edition—discusses when the disclosure should be made in order to exonerate an agent:

"A disclosure, however, is sufficient within this rule although not made at the time negotiations were begin if it is full and complete before any contract is made or obligation incurred"

Now until the shipper—and I say the "shipper" notified International, notified the buyer who made that mere request in that Plaintiff's Exhibit 1, that the order was accepted, there was nothing Larrea could have done to hold Globe.

By the Court: Tell me that. Read that.

(The record as above recorded was read by the reporter.)

By the Court: To hold whom?

By Mr. Kahn: Globe.

By the Court: To hold Globe? Nothing that Larrea could have done?

By Mr. Kahn: Larrea.
By the Court: Larrea?
By Mr. Kahn: Yes.
By the Court: That is not the question.
By Mr. Kahn: That is the question, precisely.
280 By the Court: When do you say the disclosure was made?
By Mr. Kahn: When?
By the Court: Yes.
By Mr. Kahn: May 10, 1944, before the shipment ever left Mexico, which was the letter of Mr. San Roman to Mr. Lazarus of the Globe Liquor Company.
"We inclose herewith an affidavit of the shipper to assist you"
By the Court: Let me see all the papers that the plaintiff put in evidence.
By Mr. Kahn: That is not in evidence, that particular letter is not.
By the Court: I say, let me see all the papers that the plaintiff put in evidence.

(Mr. Heineman handed documents to the Court.)

By Mr. Kahn: I have some other authorities on that, your Honor.
And may I show your Honor these two letters?
By the Court: Just a minute.
By Mr. Kahn: That I think that I am going to offer.
By the Court: Just a minute. Don't you think that when that letter of credit was issued and accepted there was a binding undertaking?
281 By Mr. Heineman: No question about it.
By Mr. Kahn: Yes, but there was no liability under that letter of credit until it was performed.
By the Court: No liability, what?
By Mr. Kahn: Under the terms of the letter of credit, until Larrea did the following things—
By Mr. Heineman: But Larrea is not mentioned.
By Mr. Kahn: Until Larrea in fact did the following things: One—
By the Court: It was a binding contract.
By Mr. Kahn: But there is no liability incurred. That is what Meacham says, "Or liability incurred".
By The Court: But the plaintiff was in a position where he could not back out. The plaintiff was tied up and bound to take the tequila.

By Mr. Kahn: All right, but he had not incurred any liability under the letter of credit until—

By the Court: Yes, he did.

By Mr. Kahn: No, not until the merchandise was shipped.

By the Court: Oh, you will have to take that question to a reviewing court. I am against you.

By Mr. Kahn: All right.

By the Court: If that letter of credit was accepted
282 then he had to take the tequila in accordance with the papers.

By Mr. Kahn: Right. But what were the papers?

If you are against me on that point, I won't spend any more time on it.

By the Court: I am against you.

By Mr. Kahn: One supplemental thought on that and I will go to the next point:

On May 10, 1944, before any liability was incurred under this letter of credit, which antedated the shipment of the merchandise, which did not occur until June 3d, International wrote Globe Liquor, attention of Mr. Lazarus:

> "We are attaching photostatic copy of Affidavit issued by the shipper in connection with the price of Mariachi Tequila, which might be of use to you for the purpose of establishing your ceiling price."

Then he tells about the difference of 25 cents in price between the white and the gold.

And attached to that letter was this affidavit of Larrea:

> "We offer Tequila Mariachi, at 1100 proof, 12/5ths. At Dis. 10.50 per case f.o.b. Laredo, Texas.
>
> 283 "We hereby certify we have not sold this brand or this product under any other brand at a lower price —prior to or since April 30, 1943."

And so on.

So, before there was any liability on the letter of credit Globe was told the name of the shipper.

By the Court: The name of the shipper, yes; I am not concerned with the shipper, all I am concerned with is who made the contract with Globe.

By Mr. Kahn: Very well. I will address myself to that.

Now, on the parol evidence rule, as to whether this is an order, Plaintiff's Exhibit 1, which your Honor has before you; and whether Plaintiff's Exhibit 2, which is a request for confirmation on the price; and the International letter suggesting changes in the letter of credit—whether those are what we call an integrated contract within the patrol evidence rule, bear in mind that the ends of justice would be best served by getting at the actual facts as they happened.

By the Court: Now, you are strong-arming that. The parol evidence rule is to prevent the varying of a
284 written contract by parol evidence. You just strong-armed the proposition that the ends of justice will be served by disregarding that rule.

By Mr. Kahn: No. I want you to bear in mind that the purpose of the rule is to prevent fraud.

By the Court: Yes.

By Mr. Kahn: And we all should support a rule of that kind.

Plaintiff's Exhibit 1, as I analyzed it yesterday, is a piece of paper asking International—addressed to International—to take an order for 750 cases of tequila; very significant in a lot of omissions in the transaction, and has reference to a letter of credit.

Now—

By The Court: There is nothing in that first paper about a letter of credit, is there?

By Mr. Kahn: The very first, I think.

By the Court: Yes, "Sixty-day letter of credit".

By Mr. Kahn: Now, there is nothing in the memorandum or this letter that says anything about the letter of credit being payable to International Industries or assigns.

By the Court: Well—

By Mr. Kahn: I want to confine myself to this
285 order.

By the Court: Here in the letter of March 24 Mr. Todes says:

"Please execute your letter of credit exactly in accordance with the form which I left with you."

By Mr. Kahn: All right. That form had the word "assigns" in it, I am assuming; at least that was the intention, and that was done.

I just want to read one case on the lack of authority of a salesman in a situation such as this.

Todes' deposition will prove that when he was employed a salesman by Mr. San Roman, he was told that all he could do was to take orders, which would have to be subject to confirmation in Mexico.

Todes is telling you the truth. And I will tell you why he is telling you the truth:

It was our joint intention to try these two cases together.

Todes' oral deposition states that he and Mr. Lazarus agreed that the order would be subject to confirmation and acceptance by the shipper in Mexico.

But that is not on this order.

By the Court: That is just it; if the parol evi-
286 dence rule does not bar that, it is admissible. But it is not.

By Mr. Kahn: In the companion suit, the original Mandl order had that express thing,

"This order subject to confirmation by shipper".

So Todes' deposition is not made out of the whole cloth.

By the Court: Your inference furnishes nothing to support that. He put it in one contract and didn't put it in the other, and because he didn't put it in one and did put it in the other therefore it ought to be in the second. That is not reasonable.

By Mr. Kahn: Very well.

By the Court: That is contrary to all of our rules.

By Mr. Kahn: Very well. But even in the case that was cited, where both parties signed the purported contracts, but because the contracts were not complete parol evidence was admissible to supply the missing terms—but the Globe order is not even as strong.

By the Court: This letter of credit is pretty complete.

By Mr. Kahn: All right.

287 By the Court: What?

By Mr. Kahn: All right. But there is ambiguity in the letter of credit.

By The Court: What is that?

By Mr. Kahn: "This credit may be assigned".

By the Court: You haven't any evidence that it was assigned. That don't make any difference.

By Mr. Kahn: The evidence will show that it was assigned.

We are taking this time to anticipate some of his objections.

By the Court: Assigning a letter of credit wouldn't make any difference.

By Mr. Kahn: "or assigns", is the way it read.

By the Court: Just a minute. With the memorandum and letters and the letter of credit, that is quite a complete contract. The mere fact that the word "assigns" is or isn't there doesn't mean it is ambiguous.

By Mr. Kahn: The word "assigns" there is ambiguous without explanation.

By The Court: Oh no.

By Mr. Kahn: Let me call your Honor's attention to three things needed:

"The word 'assigns' in itself requires explanation in order to get the true intent of the ties".

288 The Court cannot disregard the requirements of the letter of credit, which stipulates "Mexican shippers' commercial invoice".

You can't brush that aside.

And you cannot brush aside

"Original bill of lading issued to order of Mexican shipper blank endorsed".

By the Court: They asked a waiver of that, and I assume they got it.

By Mr. Kahn: Oh, no, that was never waived. They asked for waiver of originals, to save expense. That is the heart of our case.

By the Court: What is that?

By Mr. Kahn: "Mexican shippers' commercial invoice".

It means that the Chase National, who know their business, said, "if you expect us to be liable under this letter of credit you have got to produce as the condition of payment under the letter of credit, invoices directly from the Mexican shipper—not International; you have got to produce a bill of lading blank endorsed directly from the Mexican shipper".

By the Court: What of it?

By Mr. Kahn: It means they are dealing with the Mexican shipper.

By The Court: It doesn't mean anything of the kind. It doesn't mean anything of the kind.

289 You can sell me all the diamonds that may be produced in South Africa for the next thirty days—I

don't suppose you have a call on any of them, but you can sell them to me and I can deal with you, and if you don't deliver I can sue you and recover.

By Mr. Kahn: No question about that.

By the Court: And probably collect.

By Mr. Kahn: That depends on how many diamonds you are buying from me.

Yesterday I was in the "Scotch" business. Today I am in the diamond business. Tough luck.

You see, your Honor, in the light of Mr. Lazarus' admission on the stand that he knew he was dealing with a broker—

By the Court: When these men use the word "broker" they mean somebody that deals in whiskey that doesn't distill it. That is what they mean. He wasn't using that in the usual sense.

By Mr. Kahn: He spoke about commission.

By the Court: I heard what he said. I am telling you exactly what he meant.

By Mr. Kahn: Now, one more point which should be, I think, the decisive point on the law. There is another principle of agency which is applicable here in my 290 opinion.

If a buyer deals with a broker as a broker when he knows that the broker is acting for an unknown principal, if the parties mutually agree that the broker is not to be liable although the identity of the principal is undisclosed, and never is disclosed the agent is not liable.

By the Court: I think that ought to be the law.

By Mr. Kahn: That is the law.

By the Court: I haven't any doubt about it.

By Mr. Kahn: Todes will so testify in his deposition.

By the Court: That is the reason we have the parol evidence rule.

By Mr. Kahn: In this case—

By the Court: To protect any man in his right mind who would make that kind of a contract, that is the reason we have the parol evidence rule.

By Mr. Kahn: Now, he wants the tequila, and he wants it fast, and he doesn't care anything about the broker or his liability.

By the Court: He says, "I want some liquor, and I want it badly." And he says, "How many dollars?" "Eight thousand dollars". He doesn't know who is going

to get it to him, and he says, "Who is going to get it to me?" And he says "Eight thousand dollars".

291 "You are not?"

"I don't know who is".

That is just kind of silly.

By Mr. Kahn: They do that every day in the liquor business.

By the Court: They do?

By Mr. Kahn: Mr. Lazarus will tell you they do. When they want merchandise that is a frequent occurrence. I am not an expert, but when there is a demand for something they are not going to fool around with formalities.

They knew that International was not an importer.

What did International get? $1,012.50 out of $8,000. And out of that they paid probably a large part of it in expenses, ouside of the expense of this litigation.

That is the situation in this picture. Why didn't they go after Larrea?

By Mr. Heineman: I think I will answer that directly: The testimony would show that your man made two trips to Larrea and tried to get the money, and Larrea told him, "Nothing doing".

By Mr. Kahn: Sure. And then months later the Government informed him that it could be released so

292 that it could be rebottled and refiltered, and Todes gave Lazarus the names of three rectifiers.

And Shapiro his own broker suggested that it be rebottled. Everybody knew that at the time.

I think in view of this last principle that your Honor says should the law—

By the Court: Of course it should be.

By Mr. Kahn: And it is the law, and it is applicable here.

By the Court: You say that if people contract nobody shall be liable, of course nobody is liable.

By Mr. Kahn: Oh, no, the principal is liable.

By the Court: You know what you said.

By Mr. Kahn: Yes. I said that the agent should not be liable under any circumstances, when buying from an undisclosed principal.

There is another rule that when a buyer knows and ascertains the name of the principal he can sue either one and collect. So it is not as foolish a rule as it sounds.

And counsel knows that to be the law.

And Larrea recognized his obligation at the time.

The fact that he didn't want to do anything later is of no consequence. He made a fair offer at the time.

293 By Mr. Heineman: Did he send along a check?

By Mr. Kahn: I think the ends of justice here will be promoted if your Honor permits Todes to testify as to exactly what he said to Lazarus.

By the Court: I don't see any necessity—it says here, "'Should drafts under this credit be drawn by assignee, they must be accompanied by your letter of assignment".

And still that wouldn't tell us anything. They could assign it to me.

By Mr. Kahn: That is ambiguous.

By the Court: They could assign it to their bank.

By Mr. Heineman: That was to get credit to buy the merchandise.

By Mr. Kahn: That doesn't tell you anything. It is ambiguous. It requires parol evidence.

By the Court: Oh, no, it does not; it is perfectly plain.

By Mr. Heineman: They have made a negotiable instrument. Every check and every promissory note is payable to order.

By Mr. Kahn: "Assigns" is entirely different. You take subject to the original deal.

294 By Mr. Heineman: I understand, but not so far as the principles you are asserting.

By Mr. Kahn: This is evidence of the written contract.

By Mr. Heineman: The original was negotiable.

By Mr. Kahn: There is no such thing as a bill of lading—as a letter of credit being negotiable.

By Mr. Heineman: I think it is beside the point.

By Mr. Kahn: It is transferable.

By the Court: We need not digress.

By Mr. Kahn: Todes' deposition says that he said, "You make this payable to International Industries or assigns". And he explained why, because they were merely taking orders, and sending them to Mexico.

By the Court: As I say to you, that is just the reason you have the parol evidence rule.

By Mr. Kahn: Not only that, but when the First National paid these drafts—I think on June 3rd—they advanced the money on the strength of the Chase letter of

credit, then the evidence will show that the First National sent the documents to the Chase National. The Chase National could have rejected those documents if they wanted to.

And there was ample opportunity for a partial inspection at the time. But no, the market was tight, and
295 the demand was so great they wanted it and wanted it fast.

By Mr. Heineman: On what grounds could they reject it?

By Mr. Kahn: The reason it is an injustice, I think it was a mistake to have brought this suit against this man. And if we are interested in really getting at the truth of what happened between these two business men—and that is always a desirable object—and I know that your Honor with his training and knowledge of the book of rules—

By the Court: The parol evidence rule is founded on a wealth of experience. And when men put down in writing as definitely as they did in this letter of credit what they contracted for we will have to be careful about varying it by parol evidence after that.

By Mr. Kahn: We are not varying it. We are not doing that. But why did they put in here, "Shipper's commercial invoice"? Why did they put in here, "Bill of lading"? Because the shipper—

By the Court: That hasn't anything to do with this contract with the Globe Liquor Company.

No, I am against you.

Bring in the jury.

(Thereupon the jury returned to their places in the
296 jury box, and the following further proceedings were had herein in the presence and hearing of the jury:)

By Mr. Kahn: May I have the deposition of Mr. Todes?

And thereupon, the defendants to maintain the issues in their behalf, offered the following evidence:—

(Thereupon the deposition of Gabriel H. Todes, taken on behalf of defendants on December 24, 1945, in this cause, was duly opened in open court by the Clerk.)

By Mr. Kahn: Have you got a copy of the Todes deposition?

By Mr. Heineman: Yes, I have.

By Mr. Kahn: If your Honor please, I should like read the deposition of Gabriel H. Todes.

Have you a copy?

By the Court: Yes.

By Mr. Kahn: And I have stipulated with coun that any objections will stand to any of the questio and answers.

By the Court: Well, the objection I have overrule

By Mr. Kahn: I will pass them up and make
297 offer of proof.

By Mr. Heineman: Why should this be read? view of your Honor's ruling, why should even the que tions be asked in the presence of the jury?

By the Court: Step into the jury room, Ladies a Gentlemen.

(Thereupon the jury retired from the court roo and the following further proceedings were h therein out of the presence and hearing of the jury:—

By Mr. Heineman: It might be easier if we hand your Honor one copy, and we each have one copy, a you can follow it (handing document to the Court).

By Mr. Kahn: Go ahead. You are supposed to objecting. You have got them all marked.

By Mr. Heineman: I thought you were going to pr sent it to his Honor.

By Mr. Kahn: No, on the parts which you object t and I will read those into the record now.

By Mr. Heineman: All right. Starting at page 6:

"Q. What were his oral instructions to you rel tive to the taking of orders or selling of mercha dise in his behalf?"

298 By the Court: Where is that?

By Mr. Heineman: The second question from t top, your Honor.

By the Court: Yes.

By Mr. Kahn: That was withdrawn.

By Mr. Heineman: At the bottom of the page:

"Q. Where and when did you receive your i structions from Mr. Frank San Roman as t taking of orders for the sale of tequila or oth liquors?"

By Mr. Kahn: Your Honor, can we take a recess for a few minutes with a view of possibly terminating this litigation?

By the Court: Yes, I will be glad to.

(A recess was here taken, after which the following:—)

By Mr. Heineman: Wouldn't it be easier, your Honor, to have Mr. Kahn read these, and have make my objections?

By Mr. Kahn: I will read it in front of the jury. If the objection is sustained, I will read it later on.

By the Court: Objection sustained to that last question on page 6.

By Mr. Kahn: Page 6.

299 By Mr. Heineman: I have other objections, other than those I have made, on page 8.

By the Court:

"Q. What did he tell you?"

Page 7. Are you objecting to that?

By Mr. Heineman: I don't see that.

By the Court: At the middle of page 7.

By Mr. Heineman: Mr. Kahn then withdrew the question and said:

"Mr. Kahn: I think the point is well taken".

Over on page 8, your Honor, a question in the middle of the page:

"Q. What did he say relative to your method of taking orders in his behalf?"

That is objected to on the grounds previously stated, on the ground that any conversation between the defendant and Mr. Todes is not binding upon the plaintiff, and on the ground that since those instructions were reduced to writing, oral conversations with respect to that are not the best evidence.

By Mr. Kahn: I just want to show his general instructions.

By Mr. Heineman: You cannot bind the plaintiff by conversations between agent and principal.

By Mr. Kahn: I can show the man's authority.

300 The cases are legion on that.

By the Court: I know, but you can't prove authority as the case now stands; they entered into a contract here.

By Mr. Heineman: So the question of authority is not involved.

By the Court: Which was ratified by your client.

By Mr. Kahn: May I interrupt with one more thought?

By the Court: Yes.

By Mr. Kahn: That letter of credit, "Mexican shipper's invoice" meant that the money was going directly to Mexico.

By the Court: It doesn't mean anything of the kind.

By Mr. Kahn: That is exactly what happened, your Honor.

By the Court: It might have gone to Timbuctoo. It doesn't make a particle of difference.

By Mr. Kahn: The evidence will show that that is exactly what happened.

By the Court: It doesn't make a particle of difference.

By Mr. Heineman: The objection stands to the entire conversation.

By the Court: Objection sustained.

By Mr. Kahn: What page?

301 By Mr. Heineman: It starts at page 8, pages 8, 9 and 10.

By Mr. Kahn: Wait a minute. Would your Honor be good enough to tell me what pages you are passing on?

By the Court: I am on page 10. Pages 8, 9 and 10, objection sustained.

The reason is that the parties entered into a contract which was approved by the defendant.

By Mr. Heineman: Page 11 continues the discussion.

By the Court: Sustained.

By Mr. Heineman: I have no objection to the question about why he could not attend the trial.

By the Court: It may be received.

By Mr. Heineman: On page 11.

By Mr. Kahn: You are certainly making a terrific concession!

By Mr. Heineman: The next objection, your Honor, is at page 15.

By Mr. Kahn: Is page 12 all right?

By Mr. Heineman: My next objection—I have no objection to 12, 13 and 14. I think it is irrelevant but I have no objection.

Page 15, starting with:

"Q. What did you say to him, stating your own
302 words, and what did he say to you?

By the Court: Objection sustained.

By Mr. Heineman: That runs on on page 15, page 16.

Mr. Kahn: Wait a minute. I want that about market conditions, on page 16.

By Mr. Heineman: How are you entitled to show that?

By Mr. Kahn: I have got the authorities on that, no question about it. In view of the offer to refilter, that is a factual question for the jury.

By the Court: It is not responsive.

By Mr. Kahn: "Whiskey was very scarce"—

By Mr. Heineman:

"A. I called Mort on the phone and I said, 'Mort, I have some'—

"Mr. Kahn: Q. On what date?

"A. On the same day.

"I was in Wilmington, Delaware, calling on one of my wholesalers. I called Mr. Lazarus on the phone, and I said, 'Mort, I have some things that I think you can use.' Whiskey was very scarce at the time and the wholesalers were trying to get everything they possibly could."

That is not a part of the contract.

By Mr. Kahn: All right. That can go out, because he covers it later.

303 What do you object to on page 16?

By Mr. Heineman: Nothing, subject to this going out.

By Mr. Kahn: What do you object to on page 17?

By Mr. Heineman: Just a minute. The conversation starting with:

"I said, 'Mort, I think you can use this tequila. Lee Eiseman has bought 750 cases.'"

By Mr. Kahn: Is that all right?

By Mr. Heineman: No, that is out. I object to that, from that on down.

By Mr. Kahn: However, we have a right to show the identity of our people, your Honor.

By Mr. Heineman: You can put your man on the stand.

By Mr. Kahn: No, prove it by his deposition.

That last paragraph on the bottom of page 17 shows the identity and status of International Industries.

By Mr. Heineman: You can't show the identity by having the witness say they don't know anything about the liquor business.

This is not a witness testifying to the jury as to the identity of these people. He is testifying to a conversation prior to the making of the contract.

304 By the Court: Objection sustained.

By Mr. Kahn: What goes out?

By Mr. Heineman: From:

"I said, 'Mort, I think you can use this tequila.'"

I object to page 18 on the same ground.

By Mr. Kahn: They are talking about price.

By the Court: They have fixed the price.

By Mr. Heineman: It is all in the contract.

By Mr. Kahn: See how significant the fifth line is:

"He said, 'I think if I can get it in gold, the colored people would think it was Mexican whiskey and it would sell much more readily.'"

That has not been taken out of it. I think that is competent.

By the Court: For what?

By Mr. Heineman: The only purpose of that is prejudicial.

By the Court: That could be the only purpose.

By Mr. Kahn: It is the truth.

By the Court: The only purpose could be to prejudice the jury.

By Mr. Kahn: That is what he said.

By Mr. Heineman: There is no probative value.

By the Court: There is no probative value, and

305 the contract is made.

Objection sustained.

By Mr. Heineman: I also have an objection to page 19.

By Mr. Kahn: He wants to know again how fast he can get it; there was a great desire to get it because of the existing market conditions.

By the Court: Page 19, sustained.

By Mr. Kahn: When your Honor gets through with his ruling, I will make an offer of proof of all these pages.

By Mr. Heineman: You can just give them to the reporter.

By Mr. Kahn: Yes.

By Mr. Heineman: The same objection as to page 20.
By the Court: Objection sustained.
By Mr. Heineman: Page 21, the same objection.
And incidentally, his answer "In Mexico." shows what a misapprehension he was under about what he was saying to the plaintiff:

> "A. In Mexico. And every one of the samples of the letters of credit stated that in there; and when I gave it to him and when he read it, naturally he saw that."

Very clear!

306 By Mr. Kahn: He says

> "I told every account to whom I sold."

By The Court: Objection sustained.
By Mr. Heineman: To all of page 21?
By The Court: Yes, objection sustained to page 21.
By Mr. Heineman: Objection to page 22.
By The Court: Sustained.
By Mr. Heineman: Objection to page 23.
By Mr. Kahn: I have the right to show the market conditions at the time.
By Mr. Heineman: You can show the market conditions by testimony perhaps, but this is a conversation.
By Mr. Kahn: This is something better than the admission of Lazarus.
By Mr. Heineman: What is the admission?
By Mr. Kahn: They both talk about the tight situation on whiskey. That is material, your Honor.
By The Court: Objection sustained.
By Mr. Heineman: What does it prove?
By The Court: Objection sustained.
By Mr. Heineman: To page 23?
By The Court: Yes.
By Mr. Heineman: Same objection to page 24.
By Mr. Kahn: Page 24 tells about market conditions. This man is an expert.
307 By The Court: What has that to do with the case?
By Mr. Kahn: I have authorities here that say that it is a factual question whether rejection of merchandise, when there is a drop in the market, is in good faith, and whether the buyer has a right to reject it.
By The Court: Let's see your best case, just one.
By Mr. Kahn: The New York Supplement.

By The Court: You can find anything in the New York Supplement.

By Mr. Kahn: 55 Corpus Juris 450.
New York Supplement.
Texas Criminal Appeals.
And Federal Supplement.

In this case, your Honor, the proof will show that after that merchandise was held up and Larrea offered to recondition it. Lazarus wrote and said, "We can't take liquor now in view of the present liquor conditions" —the drop in the market, and stated in writing his reasons.

In *Jones* v. *Wertham*, 254 S. W. page 4, a case decided by the Supreme Court of Missouri—which is not a bad court—held such evidence is admissible as affecting defendant's good faith.

However, the material decline in market price—

308 By The Court: But that is not the question. The question here is that this liquor comes up here and had some glass in it and the Government destroyed it. That is all there is to it. As this case stands there is no question about anything else. What is the use of going into detail?

By Mr. Heineman: Have you a case that shows the duty on us to refilter by taking out the glass? We would have to refilter the whole shipment.

By Mr. Kahn: Larrea wanted to do that.

By Mr. Heineman: They are down in Mexico. Did they send a check? We never heard of it.

By Mr. Kahn: You rejected it.

By Mr. Heineman: I suppose you would expect us to incur another six hundred dollars of expense.

By Mr. Kahn: The wire said to go ahead.

By Mr. Heineman: Yes, go ahead with what?

By Mr. Kahn: You never accepted that offer.

By The Court: That was your client's job.

By Mr. Heineman: When your client advised us of that we immediately said, "if you want to recondition it, go ahead." It wasn't our job to incur the expense on the authority of someone in Mexico whom we never heard of.

309 By The Court: Objection sustained.

By Mr. Kahn: To what page??

By Mr. Heineman: Down through page 24.
Same objection to page 25.

By The Court: 25, objection sustained.
By Mr. Heineman: Page 26, same objection.
By The Court: Objection sustained, to 26.
By Mr. Heineman: Same objection to page 27.
By The Court: Objection sustained.
He says he is telling you about the communications with Mr. San Roman:

"I wrote Mr. San Roman about the Gold Tequila."

By Mr. Heineman:

"He told me that he had contacted the shipper in Mexico, and that it would be 25 cents more a case than the price for the White Tequila."

So it is perfectly evident.
By The Court: Objection sustained.
By Mr. Heineman: I think that that answer ought to go out.

(After a brief interruption:—)

By Mr. Heineman: 28 and 29. 28 I objected to.
By Mr. Kahn: What page are you on?
By Mr. Heineman: 28.
310 By Mr. Kahn: Is there a ruling on it?
By Mr. Heineman: Not yet.
By The Court: Objection sustained.
By Mr. Heineman: That was to 28 and 29, was it?
By The Court: Yes.
By Mr. Heineman: Same objection to page 30.
By Mr. Kahn: Now on page 30 we have an admission her of Lazarus, which shows his construction on what your Honor has ruled to be a contract, shows his understanding.
By Mr. Heineman: Where is that?
By Mr. Kahn: That is factual.
By Mr. Heineman: Where is that?

By Mr. Kahn:

"He said, 'I agree'—"

By Mr. Heineman: Page 30?
By Mr. Kahn: Page 30.
This is the discussion between a disinterested witness and Mr. Lazarus. I say it is competent, as it shows the attitude of Lazarus towards this deal.
And the courts have uniformly held that the parties are always bound by the construction that they place.
By Mr. Heineman: It clearly shows that he knows that Mr. San Roman did not put the glass in the tequila.

311 By Mr. Kahn:

"I agree that the shipper is responsible for it."

By Mr. Heineman: Putting the glass in.

By Mr. Kahn:

"He said, 'We want our money back.' He said, 'I am not saying that it is your fault out it is the shipper's fault.'"

By Mr. Heineman: That there was glass in the liquor; that is what he is saying.

By Mr. Kahn: Well, it is competent. It shows an intention on his part to look to the shipper.

The Supreme Court of Illinois and the Supreme Courts of other States have held repeatedly that the parties are bound.

By The Court: Where is the first conversation with Lazarus about recovery? I don't remember it.

By Mr. Heineman: I will show you. That starts on page 28—is all there is, at the bottom of page 28.

By The Court: I think I will let him answer that last question on page 28.

By Mr. Heineman: On page 28?

By The Court: Yes.

By Mr. Kahn:

"Q. What did you tell him after he told you
312 that the tequila was being held up by the Federal Food and Drug Administration?"

By The Court: Yes.

By Mr. Heineman: Certainly his statement that neither Mr. San Roman—

"—neither I nor Mr. San Roman or the International Industries were responsible for the condition of the merchandise or the quality of the merchandise; that that was the sole obligation of the shipper."—is a legal conclusion.

By Mr. Kahn: It is part of the conversation, coupled with page 30 where Lazarus says,

"I agree that the shipper is responsible for it."

By The Court: Wait a minute:

"Q. What did you tell him after he told you that the tequila was being held up by the Federal Food and Drug Administration?

"A. Well, I told him that I felt very badly about it, but, after all, neither I nor Mr. San Roman or

the International Industries were responsible for the condition of the merchandise or the shipment of the merchandise or the quality of the merchandise; that that was the sole obligation of the shipper."

313 Those are self-serving statements.

By Mr. Heineman: He was concerned about his own liability.

By The Court:

"And I suggested that he contact the shipper in Mexico. And then it was that he said to me, 'We want our money back.'"

By Mr. Heineman:

"We want our money back."

By The Court: You can have that much of it if you want to take it,

"—he said to me, 'We want our money back.'"

If you want that you can have it.

By Mr. Kahn: I think we are entitled to the entire conversation.

By The Court: I think that the rest of it is self-serving.

By Mr. Kahn: How can you couple it with Lazarus' statement on page 30? It is all part of the general conversation.

By The Court: If you want that statement,

"We want our money back"—by Lazarus, you can have it.

By Mr. Kahn: It was said, your Honor.

By The Court: You can have it now, but you can't

314 have anything else on pages 28 or 29.

By Mr. Heineman: Maybe I don't understand.

By The Court: You can put in that Mr. Lazarus said to Mr. Todes,

"We want our money back."

By Mr. Heineman: And that is all?

By The Court: That is all.

By Mr. Kahn: Just that one sentence?

By The Court: Yes.

By Mr. Kahn: The rest of it is out?

By The Court: Yes.

By Mr. Kahn: Well, it might as well all go.

By The Court: All right.

I can't remember—there was no conversation about refiltering before that?

By Mr. Kahn: There probably was not.

By Mr. Heineman: No.

By Mr. Kahn: You are on page 30 now?

By The Court: Yes.

By Mr. Kahn: I think the first answer he gave is competent; quoting Lazarus:

"A. He said, 'I agree that the shipper is responsible for it.'"

The probative force is a factual question for the jury, what he actually meant, whether he meant as Mr.
315 Heineman says, or meant anything different, that is a matter of argument. But that is factual. And we have a right to show his conception of this transaction.

By The Court: You can still argue even though he acknowledged it was the shipper and not International Industries.

By Mr. Kahn: I can argue what he meant was that he wasn't going to hold him liable.

Does your Honor rule with me on that page 30?

By The Court: Just a minute. You may have that answer at the top of page 30:

"A. He said, 'I agree that the shipper is responsible for it.' He said, 'We want our money back.' He said, 'I am not saying that it is your fault but it is the shipper's fault.'"

Now, as to this rebottling, there was a proposal from your client. That was an effort to get him to do something which he was not obligated to do.

By Mr. Kahn: The shipper had agreed to do it.

By The Court: I cannot see why he should be burdened with that.

By Mr. Kahn: If your Honor please, he is not entitled to his commission.

316 By Mr. Heineman: He means the plaintiff.

By Mr. Kahn: I see.

By The Court: The plaintiff had no obligation.

By Mr. Kahn: In view of the drop in the market?

By The Court: I am not concerned with the drop in the market. He had no obligation to refilter and rebottle. That was the proposal.

Objection sustained to the rest of page 30 and to all of page 31.

You may have the first question and the answer on page 32, if you like it; you may have all of page 32, down

to the middle of the page:

"—and I said, 'You will be making a mistake, Mort, because you can't collect from them. Neither they nor I are responsible for the shipment of this merchandise.'"

You may have all of that page down to that line if you want it.

By Mr. Kahn: Up to that line?

By The Court: Down to that line, from the top down to that line.

By Mr. Heineman: All of page 33 is objected to, your Honor.

By The Court: Objection sustained to 33.

By Mr. Heineman: All of page 34 is objected to.

317 By The Court: Objection sustained.

By Mr. Heineman: 35 and 36 are likewise objected to.

By The Court: Page 35, objection sustained.

Objection to 36 sustained.

By Mr. Heineman: 37 is objected to.

By The Court: Sustained.

By Mr. Kahn: Page 38 I think is competent. It is a conversation with one of the attorneys of the Globe Liquor Company.

By the Court: Objection sustained down to:

"Q. Did you ever talk to Mr. Albert Young, one of the attorneys for Globe Liquor Company?"

Objection sustained.

The rest of the page, beginning with that question, is admitted.

By Mr. Heineman: I have no objection to page 39, down to the cross examination—39 and 40.

By The Court: All right. They may be admitted.

Is there any of the cross examination of the witness that you want in?

By Mr. Heineman: Yes, there was, in view of your Honor's ruling—

By The Court: I say, in view of my ruling is 318 there any that you want in?

By Mr. Heineman: At the bottom of page 41 there is a question and answer as to which I think, however, after Mr. Kahn's admission in his opening statement is sufficient, so that I don't need it, although I think I would like it in, and the next question and answer at the top of the page.

By the Court: I think to be consistent I will have to sustain the objection.

By Mr. Heineman: I agree. I withdraw that.

By Mr. Kahn: What goes out?

By Mr. Heineman: So far everything is out. I haven't put in any of the cross at all.

By Mr. Kahn: You don't want any of the cross?

By Mr. Heineman: Just a second. I am checking it.

By Mr. Kahn: I don't believe you can simply withdraw the cross examination because you don't like it.

By Mr. Heineman: The rulings of his Honor—

By Mr. Kahn: What do you want out of it?

By Mr. Heineman: At the moment I don't want anything in.

By Mr. Kahn: There is nothing in it about the contract; it is all the situation of the parties.

By Mr. Heineman: In view of your direct, which his Honor has largely eliminated, I think the cross with
319 respect to the conversation obviously is out.

By Mr. Kahn: I don't see anything said about conversation. You are asking pointed question.

By Mr. Heineman: You mean you have no objection to my cross examination going in?

By Mr. Kahn: No.

By Mr. Heineman: Under the circumstances I will let my cross stand, your Honor, if there is no objection.

By Mr. Kahn: There are a couple of objections, just turning these pages over, that I wanted to bring out.

By Mr. Heineman: It is perfectly silly to have the cross go in when there is no direct in the record for the jury.

By Mr. Kahn: I will even withdraw every objection I have got here, to save time.

By Mr. Heineman: No. Because on cross, for example page 46, just to give you one example:

> "Q. You testified that in the course of that conversation you advised Mr. Lazarus that the International Industries were not responsible for the quality of the merchandise?"

That was a rephrasing of his direct.

By Mr. Kahn: We will have to go through it, I am afraid, then, page by page like we did on the direct.
320 By Mr. Heineman: Very well.

Page 40. As far as I am concerned page 40 is all right.

By Mr. Kahn: You make up your mind what you want out.

By Mr. Heineman: I would like 41 to stand.

By Mr. Kahn: All right.

By Mr. Heineman: And 42 to stand.

By Mr. Kahn: All right.

B Mr. Heineman: Those are without objection by you?

By Mr. Kahn: Yes, I say.

By Mr. Heineman: And 43 to stand. Wait just a minute, I don't see any point to where I start explaining the order, there is no point in repeating that.

By Mr. Kahn: Do you want it out?

By Mr. Heineman: Yes.

By Mr. Kahn: All right, it is out.

By The Court: Where is that?

By Mr. Heineman: Page 43, where it says:

"Mr. Heineman: May it be stipulated that a true copy of the order"—

That simply refers to Exhibit 1.

By Mr. Kahn: 44 can go out because Lazarus cov-
321 ered it.

By Mr. Heineman: Which reminds me, you never produced that letter.

By Mr. Kahn: I never could find it.

By Mr. Heineman: Page 43, starting with "Mr. Heineman" and the balance of page 43, down to the question at the bottom of page 44,

"Q. Now, how many copies of that order were made?"

I would like that and what follows to stay in.

By Mr. Kahn: All right.

By Mr. Heineman: I would like 45 to stay in.

By Mr. Kahn: All right.

By Mr. Heineman: And the identification at the bottom of page 45:

"Mr. Heineman: Q. Now I show you a letter dated March 24, 1944, that is attached to the complaint"—

There is no point for that. Let that go out.

By Mr. Kahn: All right.

By Mr. Heineman: The same thing, all of 46 can go out.

By Mr. Kahn: All of 46 out?

By Mr. Heineman: Yes, all of 46 out.

All of 47 can go out except the question—wait just
322 a minute now, I am sorry—on 47, down to the question:

"Q. In the course of your conversation with Mr. Lazarus:—"

I would like the top part of 47 down to that point to go out.

I would like all of 48 to stay in. And 49.

Of course, it doesn't make any sense; it is perfectly good stuff for cross, but it doesn't make a bit of sense to put it in in view of the rulings on the direct—it doesn't make any sense to the jury.

By Mr. Kahn: Do you want it in, or not—page 49?

By Mr. Heineman: Starting at page 48, the middle, where it says "Liquor is often imported," I would like that out, and everything after that out, on 48. 49 out.

By Mr. Kahn: You want 50 out?

By Mr. Heineman: Yes.

By Mr. Kahn: 51 out?

By Mr. Heineman: Yes.

By Mr. Kahn: 52?

By Mr. Heineman: Yes.

By Mr. Kahn: 53?

By Mr. Heineman: Yes.

323 By Mr. Kahn: 54?

By Mr. Heineman: Yes. 55 out.

By Mr. Kahn: I want 55 in.

By Mr. Heineman: All right.

By Mr. Kahn: Will your Honor turn to page 55?

By The Court: I have it.

By Mr. Kahn: Mr. Heineman's question:

"Q. Why did you return the commission of $750 that you had been paid by the Globe Liquor Company?

"A. Mr. Lazarus is a friend of mine and he wrote me and told me that he would like to have the check back, and to keep his friendship I returned the check. Seven hundred and fifty didn't mean that much to me. Not that I couldn't use it; don't misunderstand me."

By Mr. Heineman: All right, let it stay in from that point on:

"Q. Why did you return the commission—"

From there on down to the bottom.

By Mr. Kahn: We will return our commission, too, if you will take it.

By Mr. Heineman: I will take 55; from that point on.

324 And 56.

By Mr. Kahn: You mean you want it in?

By Mr. Heineman: Yes. I think that he put it right on the line—that question and answer.

"Q. Now, you also testified that in the course of your conversation with Mr. Lazarus on March 16, 1944, you advised him that it would be safer for him to have the letter of credit made payable to the International Industries;"

and so on.

It is my understanding you are not making objection to that, is that correct?

By Mr. Kahn: You heard me.

By Mr. Heineman: I say, is that correct, so the reporter gets it.

By Mr. Kahn: Yes, I am not making any objection.

By Mr. Heineman: 55 from that point.

And 56.

And the same thing is true of 57.

By Mr. Kahn: Do you want 57 in?

By Mr. Heineman: Yes.

And 58 down to the redirect.

This is the dilemma you get into in this kind of procedure, because I object to those questions but counsel doesn't object to the cross though I object to the

325 redirect and the record becomes very one-sided.

By Mr. Kahn: Do you object to anything on 58?

By Mr. Heineman: You mean you will let it go out by agreement?

By The Court: I can't hear you.

By Mr. Kahn: If you want it out, let it go out. The redirect, do you want it out? There is nothing of any particular probative force on 58 or 59 or 60.

By Mr. Heineman: Just a minute.

By The Court: The fact is I don't know what you are cross examining on.

By Mr. Heineman: No. There is no direct left. And it seems to me the record becomes confused. I do not want by this kind of procedure to introduce error into this record. And it seems to me we are very apt to do that. I think in view of your Honor's ruling on the direct

it simply confuses the jury. And I withdraw all cross examination in view of the fact that there is nothing now before the jury on the direct.

By Mr. Kahn: Oh, no, that cross examination your Honor has let in.

By The Court: I have stated to you that in view of my rulings on the direct I do not see anything material to cross examine on.

326 By Mr. Heineman: No, I agree.

By Mr. Kahn: You did admit two or three of those.

By The Court: You can get the cross examination of what I let in that is relevant and material.

By Mr. Heineman: I say the cross becomes irrelevant.

By The Court: All the rest of it is irrelevant, just wasting time.

By Mr. Kahn: I am objecting to this record and making my offer. And to save time I will state now that redirect 58, 59, 60 and 61 can go out. And I agree with you. All right?

By Mr. Heineman: All right.

By Mr. Kahn: I would like 62 to stay. That refers to the drop in the market value of tequila. This man is an expert.

By The Court: There is no relevancy to the issue.

By Mr. Heineman: None at all.

By The Court: Sustained.

By Mr. Kahn: 62, that goes out. All right. The same ruling he is making on the balance of that, and 63, about the bottom dropping out of the tequila market.

By The Court: It has no particular relevancy. It has no materiality, rather.

By Mr. Kahn: Then the rest of it I assume you 327 want out?

By Mr. Heineman: Yes.

By Mr. Kahn: All right.

May we be excused until two o'clock, your Honor?

By The Court (Addressing the Marshal): Let the jury go until two o'clock.

We will recess until two o'clock.

(Whereupon a recess herein was taken until 2:00 o'clock P. M. of the same day, March 14, 1946.)

328 • • (Caption—No. 45 C 120) • •

Chicago, Illinois, March 14, 1946, 2:00 o'clock p. m.
Met pursuant to recess.
Present: Mr. Heineman, Mr. Kahn.

And thereupon the following further proceedings were had herein:—

By The Clerk: 45 C 120. Globe Liquor Co., Inc., against Frank San Roman, on trial.

By The Court: Proceed.

By Mr. Kahn: I think we can go ahead with some oral testimony in behalf of the defendant.

(Thereupon the jury took their places in the jury box, and the following further proceedings were had herein in the presence and hearing of the jury—)

By Mr. Kahn: I will call Mr. Frank San Roman, the defendant, to the stand.

329 FRANK SAN ROMAN, one of the defendants herein, having been called as a witness on behalf of the defendants, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Kahn.

Q. Now speak up plainly and loudly, Mr. San Roman, so that I can hear you back here, and keep your voice up.

Will you state your name in full?

A. Frank San Roman.

Q. Where do you live?

A. 5915 North Keating Avenue.

Q. Chicago, Illinois?

A. Chicago, Illinois.

Q. What is your business?

A. Exporter.

Q. Are you married?

A. Yes.

Q. To whom?

A. Mrs. Dorothea San Roman.

Q. How many children have you?

A. Three.

Q. Are you in business with your wife?

330 A. Yes.

Q. Is it a partnership? A. Yes.

Q. What is the name of the firm? A. International Industries.

Q. How many locations do you have in your business?

By Mr. Heineman: Objection.

By Mr. Kahn: I want to show who they are and the extent of their business.

By The Court: Well, you can show what their address is.

By Mr. Kahn:

Q. What is your business address? A. 600 South Michigan Avenue.

Q. Do you occupy a suite there? A. That is correct.

Q. How many offices do you have there?

By Mr. Heineman: Objected to.

By The Court: Sustained.

By Mr. Kahn:

Q. Do you have any other location? A. No.

By Mr. Heineman: Objected to.

By Mr. Kahn:

331 Q. Do you have any warehouses? A. No.

By Mr. Heineman: Objected to.

By The Court: Sustained.

By Mr. Kahn:

Q. Do you conduct a brokerage business as well as an export business?

By Mr. Heineman: Objected to.

By Mr. Kahn: I have a right to show that they do, your Honor.

By The Court: He may answer.

By The Witness:

A. Yes.

By Mr. Kahn:

Q. Are you a citizen of the United States? A. Yes.

Q. When were you naturalized? A. 1942.

Q. Is your wife a citizen? A. Yes.

Q. Are you in the liquor business?

By Mr. Heineman: Objected to.

By The Court: Sustained.

By Mr. Kahn:

332 Q. Do you have a liquor importer's license?

By Mr. Heineman: Obejcted to.

By The Court: Sustained.

By Mr. Kahn:

Q. Did you ever have a liquor importer's license?

By Mr. Heineman: Objected to.

By The Court: Sustained. Strike out the answer. Don't answer until objection is ruled on.

By Mr. Heineman: I ask that the answer be stricken.

By The Court: Strike it out.

By Mr. Kahn:

Q. Relative to this transaction of 750 cases of tequila, are you familiar with it? A. Yes.

Q. Do you know Gabriel Todes? A. Yes.

Q. Was he employed by you as a salesman? A. Yes.

Q. When? A. I believe it was in the latter part of 1943 or the early part of 1944, I don't remember correctly.

Q. Did you have a conversation with him when
333 you employed him? A. Several conversations.

Q. When and where? A. In my office, most of them.

Q. All right. Did you tell him what his authority was? A. Yes.

Q. What did you tell him? A. I told him that—

By Mr. Heineman: Objected to.

By The Court: Sustained.

By Mr. Kahn:

Q. Did Mr. Todes have any authority other than that to submit orders to you for this tequila?

By Mr. Heineman: Objected to as leading and irrelevant.

By The Court: Sustained.

By Mr. Kahn:

Q. This merchandise was shipped to Globe Liquor Company, wasn't it? A. Correct.

Q. Directly from Mexico? A. That is correct.

Q. You have had some experience with letters of
334 credit on transactions where tequila and other liquor was shipped from Mexico during 1943 and 1944?

By Mr. Heineman: The form of the question is certainly objectionable; this is not cross examination.

By The Court: Sustained.

By Mr. Heineman: This is direct.
By The Court: Sustained.

By Mr. Kahn:
Q. Have you had any experience in connection with letters of credit covering shipments of tequila and other liquors, being made directly from Mexico to the United States during the latter part of 1943 and 1944? A. Yes.
Q. How many of those transactions did you handle?
By Mr. Heineman: That is objected to as irrelevant. It has no bearing on the issues.
By Mr. Kahn: It shows familiarity with the procedure and in customs.
By The Court: You may answer.

By The Witness:
A. About three or four transactions.

By Mr. Kahn:
Q. Are the regulations and practices of the peo-
335 ple in Mexico different from those in this country?
By Mr. Heineman: Objected to.
By The Court: Sustained.

By Mr. Kahn:
Q. Now when the 750 cases of tequila was paid for by the Globe Liquor Company, was that money paid to you?
By Mr. Heineman: Objected to.
By The Court: Sustained.
By Mr. Kahn: I think I have a right to show that, your Honor.
By The Court: Sustained.

By Mr. Kahn:
Q. What part of the purchase price for the 750 cases of tequila paid for by Globe Liquor Company did your firm receive?
By Mr. Heineman: Objected to.
By The Court: Sustained.

By Mr. Kahn:
Q. Did you ever assign the letter of credit that the Chase National Bank gave you in this case?
By Mr. Heineman: Objected to.
By Mr. Kahn: It is susceptible of assignment.

By Mr. Heineman: The question of whether or not
336 it has been assigned has no relationship to the liability of the parties here.

By Mr. Kahn: It is subject to assignment.

By The Court: Sustained.

By Mr. Kahn: I want to make an offer of proof, if the Court please of a number of things.

By The Court: Step into the jury room Ladies and Gentlemen.

(And thereupon the jury retired from the court room and the following further proceedings herein were had out of the presence and hearing of the jury—)

By Mr. Kahn: On behalf of the defendants I should like to make the following offer of proof:

That if the witness Frank San Roman would be permitted to testify in answer to the questions I would ask him, he would testify to the following facts:

That the letter of credit of the Chase National Bank was assigned by him in its entirety to The First National Bank of Chicago, who in turn assigned the letter of credit or issued a supplementary or other letter of credit in favor of the Mexican shipper for the full purchase price of the 750 cases at $10.75 a case.

337 That when the Globe Liquor Company ultimately paid or the Chase National Bank paid the amount of this full purchase price, that no part of the purchase price or the funds were handled by International Industries.

That the moneys or drafts drawn by International Industries against this transaction were advanced by the First National Bank of Chicago who sent the money to Mexico in its entirety.

That the First National in turn sent the title papers and all the documents evidencing the shipment to the Chase National Bank who reimbursed the First National Bank for the amount of that draft.

That after the Mexican shipper receives the entire purchase price at invoice it caused the sum of $1,012.50, the agreed brokerage at $1.35 a case on the 750 cases to be paid to Mr. San Roman, that is to say, his firm.

That the sum of $1,012.50 is the total sum that International Industries has received as a commission or brokerage as a re ult of this transaction.

I also offer to prove by this witness that under the manner of doing business in Mexico at the time the
338 Mexican shipper would not send on the invoice and the bill of lading and the consular certificate and the other documents called for in the letter of credit until the Mexican shipper was paid the full invoice price in its entirety.

I also offer to prove by this witness that out of the $1,012.50, which was his total gross brokerage compensation as the result of this transaction, he incurred the following charges:

First National Bank sundry charges	$ 43.81
Commission to G. H. Todes	150.00
Commission to R. Turlan y Cia., S de R. L.	241.88
Refund to Fine Needle de Mexico, S. Derl for insurance and Mexican taxes	63.58
Long Distance calls and cable charges (Prorated)	59.95
Travelling expenses in connection with two trips by Mr. F. San Roman prior to June 1, 1944 (prorated)	111.11
Total	$670.34

That Mr. San Roman made further trips in the fall of 1944 in an effort to induce the shipper to adjust the controversy here, and incurred an additional expense.
339 That is the offer of proof.

By The Court: Any objection?

By Mr. Heineman: I have no objection to his making an offer of proof.

By The Court: Any objection to the receipt?

By Mr. Heineman: No.

By The Court: You do object to the evidence?

By Mr. Heineman: I do object to the evidence.

By The Court: Objection sustained.

By Mr. Kahn: All right. You may cross examine.

By Mr. Heineman: No questions.

By The Court: Bring in the jury.

You may step down.

(Witness excused.)

(Thereupon the jury took their places in the jury box, and the following further proceedings were had herein in the presence and hearing of the jury:)

By Mr. Kahn: I offer in evidence Defendants' Exhibit 1, an original letter of the Globe Liquor Company dated April 21, 1944, signed by M. L. Lazarus, President.

340 By Mr. Heineman: Objected to as immaterial.

By Mr. Kahn: The purpose is in the third paragraph, the appointment of Jovita Perez, as their broker; that is the purpose for which that document is offered.

By The Court: I do not see the materiality of it.

By Mr. Kahn: I want to show the appointment, in the fourth paragraph, of Jovita Perez as their broker.

By The Court: That doesn't make any difference.

By Mr. Kahn: Do you concede as a fact that she was your broker?

By Mr. Heineman: I regard the entire matter as immaterial.

By The Court: Immaterial, sustained.

(Which said document so offered in evidence by the defendants, was marked DEFENDANTS' EXHIBIT 1 for identification. The Court refused to admit said document so offered as aforesaid. Defendants' Exhibit 1 for identification is as as follows:—)

341 By Mr. Kahn: I offer in evidence as Defendants' Exhibit 2 letter of Globe Liquor Company dated April 27, 1944, addressed to Pine Needle de Mexico, S. do R. L. Mexico, signed by Mr. Lazarus.

By Mr. Heineman: Objection, as immaterial.

By Mr. Kahn: Now that shows—there is an admission that the International acted as brokers, in the second line, your Honor, there of that letter.

By Mr. Heineman: If the Court please, in addition to the objection on the ground of immateriality, I do not understand—

By Mr. Kahn: There is only one line, one word in that letter that is competent, the second sentence.

By the Court: I don't think it throws any light on the situation.

By Mr. Kahn: It says "Purchased through International Industries".

By the Court: Objection sustained.

(Which said document so offered in evidence by the defendants, was marked DEFENDANTS' EXHIBIT 2 for identification. The Court re-
342 fused to admit said document so offered as aforesaid. Defendants' Exhibit 2 for identification is as follows:—)

343 By Mr. Kahn: I offer in evidence as Defendants' Exhibit 3 original telegram of Globe Liquor Company dated May 17, 1944.

By Mr. Heineman: I have no objection.

By the Court: Let it be received.

(Said document was received in evidence by the Court and marked DEFENDANTS' EXHIBIT 3. Said document is as follows:—)

344 Mr. Kahn: This telegram, if the jury please, Defendants' Exhibit 3, is as follows:

"Wilmington Del 1024 A May 17 44
Intl Industries 600 S Michigan Ave Chicago Ill. Our bank advised they have authorized Chase to extend credit to June 15 Globe Liquor Co 945 A"

By Mr. Kahn: I offer in evidence as Defendants' Exhibit 4 letter of International Industries dated May 10, 1944, addressed to Globe Liquor Company—and counsel makes a good suggestion—I also offer as a companion to Defendants' Exhibit 4, Defendants' Exhibit 5, which is the affidavit of Gonzalo A. Larrea, dated April 28, 1944.

By Mr. Heineman: Both Defendants' Exhibits 4 and 5 are objected to on the ground, first, that they are immaterial; second, on the ground that assuming that this disclosed the name of a seller it does not show who the seller was—and more important, in any event it is the disclosure of the name of principal, on the defendants' theory, long after the contract was entered into and the parties bound.

345 By Mr. Kahn: There wasn't any binding liability until the merchandise was shipped. It wasn't shipped

until May 22. These are dated May 10. They contain the name of the shipper.

By Mr. Heineman: Under the authorities shown your Honor this morning from Illinois it is clear that the doctrine of partil disclosure applies.

By the Court: Objection sustained.

(Which said document so offered in evidence by the defendants, was marked DEFENDANTS' EXHIBIT 4 for identification. The Court refused to admit said document so offered as aforesaid. Defendants' Exhibit 4 for identification is as follows:—)

346 (Which said document so offered in evidence by the defendants, was marked DEFENDANTS' EXHIBIT 5 for identification. The Court refused to admit said document so offered as aforesaid. Defendants' Exhibit 5 for identification is as follows:—)

347 By Mr. Kahn: I offer in evidence as Defendants' Exhibit 6 original letter of Jovita Perez dated May 27, 1944, containing the name of the shipper, addressed to International Industries, with a carbon copy to Globe Liquor Company.

By Mr. Heineman: It is conceded in accordance with the stipulation that Globe Liquor Company received a carbon copy. But the letter is objected to as immaterial.

By Mr. Kahn: It also discloses the name of the shipper before the merchandise came up here.

By the Court: Objection sustained.

(Which said document so offered in evidence by the defendants, was marked DEFENDANTS' EXHIBIT 6 for identification. The Court refused to admit said document so offered as aforesaid. Exhibit 6 for identification is as follows:)

348 By Mr. Kahn: I offer in evidence as Defendants' Exhibit 7 letter of International Industries to Globe Liquor Company dated May 27, 1944, telling them that the merchandise left Mexico on May 22.

Any objection?
By Mr. Heineman: No.
By the Court: It may be received.

(Said document was received in evidence by the Court and marked DEFENDANTS' EXHIBIT 7. Said exhibit is as follows:—)

349 By Mr. Kahn: I will read this, if your Honor please.
By the Court: Very well.

"May 27, 1944

"Globe Liquor Co., Inc.,
18th and Market Streets,
Wilmington, Delaware.

Att: Mr. M. L. Lazarus

Gentlemen:
We are pleased to advise that your lot of Mariachi Tequila was shipped from Mexico on May 22nd in Car RI-159322. We would suggest therefore, that you communicate with your broker in Laredo.

Yours very truly,
International Industries

.....
Managing-Director"

By Mr. Kahn: I offer in evidence as Defendants' Exhibits 8, 9 and 10—

Defendants' Exhibit 8 being a declaration of shipper of food drug and cosmetic products signed Gonzalo A. Larrea, dated May 23, 1944, in Mexico, containing a certificate as to the character of the merchandise;

350 Defendants' Exhibit 9 being the notice of Gonzalo A. Larrea to Globe Liquor Company covering that shipment dated May 23, 1944.

And Defendants' Exhibit 10 the special consular certificate in Mexico dated May 23, 1944, of Larrea, and having the United States consular invoice attached.
I might say further that these last three documents came from the possession of the Globe Liquor Company. They were given to me by their counsel.
By Mr. Heineman: The offer is objected to, your Honor, on the ground of immateriality.

By Mr. Kahn: This is part of our case and shows who sold it.

By Mr. Heineman: They show nothing whatever. And further, even on the defendants' theory for which they are offered they are contrary to the doctrine in Illinois of the partially disclosed principal.

By Mr. Kahn: That is in strict compliance with the letter of credit, shipper's invoice from Mexico.

By Mr. Heineman: It would not have mattered so far as payment was concerned under the letter of credit
351 whose name was on those documents.

By Mr. Kahn: The letter of credit says "shipper's invoices".

By Mr. Heineman: That is to say whether it would have been Gonzalo A. Larrea or anyone else.

By Mr. Kahn: That is right, "shipper's invoice".

By Mr. Heineman: It could have been anyone who delivered it to the railroad.

By Mr. Kahn: In accordance with the letter of credit. It came out of the Globe files.

By Mr. Heineman: That admission has been conceded before this case started.

I object to the reception of these documents.

By the Court: Objection sustained.

(Which said document so offered in evidence by the defendants, was marked DEFENDANTS' EXHIBIT 8 for identification. The Court refused to admit said document so offered as aforesaid. Defendants' Exhibit 8 for identification is as follows:—)

352 (Which said document so offered in evidence by the defendants, was marked DEFENDANTS' EXHIBIT 9 for identification. The Court refused to admit said document so offered as aforesaid. Defendants' Exhibit 9 for identification is as follows:—)

353 (Which said document so offered in evidence by the defendants, was marked DEFENDANTS' EXHIBIT 10 for identification. The Court refused to admit said document so offered as aforesaid. Defendants' Exhibit 10 for identification is as follows:—)

354 By Mr. Kahn: I offer in evidence as Defendants' Exhibit 11 a telegram dated July 22, 1944, addressed to Globe Liquor Company by Gonzalo A. Larrea, offering to refilter and rebottle the shipments.

By Mr. Heineman: Objected to as immaterial; no duty on the plaintiff to act in accordance with an unknown person's instructions. Objected to on the grounds stated in our discussion this morning.

By the Court: Objection sustained.

(Which said document so offered in evidence by the defendants, was marked DEFENDANTS' EXHIBIT 11 for identification. The Court refused to admit said document so offered as aforesaid. Defendants' Exhibit 11 for identification is as follows:—)

355 By Mr. Kahn: I offer in evidence as Defendants' Exhibit 12 letter of G. H. Todes to Globe Liquor Company dated July 12, 1944, suggesting the names of three rectifiers to rebottle and refilter the shipment.

By Mr. Heineman: Objected to on several grounds: It is immaterial; it is self-serving; and there is no duty upon the plaintiff to do any of the things suggested by Mr. Todes.

By the Court: Objection sustained.

(Which said document so offered in evidence by the defendants, was marked DEFENDANTS' EXHIBIT 12 for identification. The Court refused to admit said document so offered as aforesaid. Defendants' Exhibit 12 for identification is as follows:—)

356 By Mr. Kahn: I offer in evidence as Defendants' Exhibit 13 letter of Globe Liquor Company to International Industries, dated July 24, 1944, which acknowledges receipt of a telegram from "your principals in Mexico."

By Mr. Heineman: Objected to on the ground as being after the event and after the defendants had advised plaintiff that they were acting as agent; and that it is immaterial on the question of liability with due relationship of it in point of time to the transaction.

By the Court: Objection sustained.

(Which said document so offered in evidence by the defendants, was marked DEFENDANTS' EXHIBIT 13 for identification. The Court refused to admit said document so offered as aforesaid. Defendants' Exhibit 13 for identification is as follows:)

357 By Mr. Kahn: I offer in evidence as Defendants' Exhibit 14 the Globe letter dated July 27, 1944, refusing to use the tequila in view of present liquor market conditions. That is Defendants' Exhibit 14.

By Mr. Heineman: Objection for the same reason heretofore stated.

By the Court: Objection sustained.

(Which said document so offered in evidence by the defendants, was marked DEFENDANTS' EXHIBIT 14 for identification. The Court refused to admit said document so offered as aforesaid. Defendants' Exhibit for for identification is as follows:—)

358 By Mr. Kahn: That completes the documentary proof offered by defendants.

Now, if your Honor will just permit me to check my notes for just a minute or two.

By the Court: Yes.

By Mr. Kahn: Defendants rest.

And thereupon the Defendants rested their case.

By Mr. Heineman: Plaintiff rests, and moves that the Court instruct the jury to return a verdict in favor of the plaintiff in the amount stated in the evidence.

By Mr. Kahn: I should like to be heard.

By the Court: Step into the jury room, Ladies and Gentlemen.

(And thereupon the jury retired from the court room, and the following further proceedings herein were had out of the presence and hearing of the jury:—).

By Mr. Heineman: I can be very brief, if your Honor wishes to hear from me.

By the Court: I do not see any defense.

By Mr. Heineman: No.

359 By Mr. Kahn: Of course, the scope of my argument is necessarily greatly limited by reason of your Honor's rulings. I won't take up your time now trying to get you to reverse any of those rulings, but simply confine myself to the record as it is.

There are the following factual questions left in the case as the record stands now:

The jury are the sole judges of the inferences and probative value of Mr. Lazarus' admissions in open court, that he knew that International were acting as brokers, and that they were getting a commission—I am quoting his words of "a broker". I know he definitely used the word "commission".

Couple that with the express stipulations in the letter of credit issued by Chase National—which is no stranger to these transactions, particularly foreign transactions, containing express stipulations.

I am also confined by your Honor's prior ruling that the letter of credit is part of the written contract here.

The written contract evidenced by this letter of credit stipulates conditions. Under your Honor's ruling this is the only thing that constitutes the contract. I know

360 Mr. Heineman will concede that.

Construe them all together and be guided by them. The order refers to a sixty-day letter of credit. And what are the terms of the letter of credit? If you construe them together as one contract it could only be made by the letter of credit and pursuant to its terms.

And what was the deal as evidenced by the letter of credit?

So far as this letter of credit shows it shows that the buyers insisted that they would have to have, not the bill of sale or the invoices of International, they didn't care anything about International, they insisted on getting invoices directly from the shipper, whoever he might be.

They were told the name of the shipper in the proof that was offered here.

The merchandise did not leave Mexico until May 22.

The draft was paid at the First Nation.

The shipping documents were sent by the First National east after the First National paid the drafts.

The Chase National examined these documents. They are in order.

They could have refused to admit any liability
361 under this letter of credit if the invoices were those of International.

And in all fairness plaintiff's position is that they seek to hold International on a letter of credit where International has no part of the performance here, had no control over the shipment, had no control over the documents.

You couple that with the deposition of Todes, which has been permitted to remain—that portion that you did, and I think the Court should let the case go to the jury on this one quotation as to its probative force:

Todes testified that he went to Lazarus and said, "I agree that the shipper is responsible for it."

He said, "We want our money back."

He said, "I am not saying it is your fault but it is the shipper's fault."

That is the truth, because it was not denied. And Mr. Lazarus had full opportunity to deny that statement of a totally disinterested credible witness who was his own friend.

On that alone it should go to the jury as to his understanding of the deal under the terms of the letter of credit and his understanding after the shipment came in and was detained.

362 There is another factual question for the jury to pass on in this case:

Was the sampling by the Government a fair one?

The only evidence thus far is—and taking it in its most favorable inferences, that ten percent of the shipment contained deleterious or harmful matter.

And I can't do any better than repeat the analogy that I gave you yesterday, that it all depends on what the market conditions are as to whether rejection of nine-tenths presumably good merchandise is justified.

And the jury have a right to use their own knowledge and their own inferences as to the real reason for rejecting the merchandise.

And it is obvious that that was done because of the drop in the market.

The jury have a right to determine from the various inferences that may arise out of a thing, out of the reasonable pleadings we have here, what was the meaning of the word "assigns" in this letter of credit; particularly when

it is coupled to the stipulations in the letter of credit that the Letter of Credit demanded the production of shipper's invoices.

363 I think there is enough here to go to the jury, to let the jury pass on, I think, as a matter of law, that there are contested issues of fact here that the jury should and must pass upon.

By The Court: I do not think there is any issue of fact. I do not think there is any defense. What was the amount? (Addressing plaintiff's counsel).

By Mr. Heineman: It was read into the record, and I am sorry the notations were apparently destroyed.

By The Court: Take a short recess.

(After a short recess, the following:—)

By Mr. Heineman: The amount, your Honor, is $9,704.25.

By Mr. Kahn: If your Honor pleases, I want to file a written motion for an instructed verdict at the conclusion of all the evidence.

By The Court: Very well. Let it be filed. It may be denied.

And thereupon at the close of all the evidence the defendants moved the Court in writing to instruct the jury to find the defendants not guilty; but the Court denied said motion and refused to give said

364 instruction to the jury, and marked said motion "Denied" and said instruction refused; which said motion and which said instruction are as follows:

365 By The Court: How much did you say the amount was?

By Mr. Heineman: $9,704.25.

By The Court: $9,704.25?

By Mr. Heineman: Yes, your Honor.

By The Court: Bring in the jury.

(Thereupon the jury returned to their places in the jury box, and the following further proceedings herein were had in the presence and hearing of the jury:—)

By The Court: Ladies and Gentlemen of the Jury, the evidence has been completed in this case; and having been completed it appears that the defendants have no defense, and have presented no defense to this jury.

Accordingly it beomes the duty of the Court to direct the jury to find a verdict for the plaintiff in the amount which was shown by the evidence to have been expended by the plaintiff for this tequila which we have heard about; that sum is Nine Thousand Seven Hundred and Four Dollars Twenty-five Cents ($9,704.25).

Accordingly I now direct you to render a verdict for that amount. And I appoint this gentleman here in the first chair in the first row (indicating) Foreman of this jury; and you may sign first, sir, and then you may all sign.

366 Will you furnish these folks with a pen, Mr. Clerk? You can sign right there.

(Jurors signing said verdict.)

By A Juror: Your Honor, before I sign, may I ask the Court one question?

By The Court: Yes.

By The Juror: What has become of this shipment?

By the Court: The United States destroyed it.

(Jurors continued the signing of said verdict.)

(Verdict handed to the Clerk.)

By the Court: You may enter the verdict, Mr. Clerk. Thank you for your attention, Ladies and Gentlemen. Let there be judgment on the verdict.

By Mr. Kahn: I just called Mr. Heineman's attention that I assume from our comment as we went along on the Todes deposition that what went out will stay out, it will simply be offered as an offer of proof, and the few fragments that were left in will be considered as introduced in the record. I did not take the time or the trouble to read those in.

By The Court: They were not introduced.

By Mr. Kahn: I know they were not and that is why Mr. Heineman is now consenting to let me put them

367 in.

By Mr. Heineman: He inadvertently omitted it and I am reluctant frankly to take advantage of an omission by counsel which I know is inadvertent.

By The Court: You are agreeing that those fragments to which objections were not sustained may go in?

By Mr. Heineman: I am agreeing that they may go in.

By The Court: That only had to do with the direct testimony.

By Mr. Heineman: That is correct.
By The Court: Very well.

Which was all of the Evidence offered and received and all of the Proceedings had upon the Trial of the Above-Entitled Cause.

368 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 45 C 120) * *

CERTIFICATE.

I hereby certify that the above and foregoing is a full, true and accurate transcript of my original shorthand notes taken upon the trial of the above-entitled cause.

Roy E. Fuller
Roy E. Fuller,
Official Court Reporter, United States District Court, Northern District of Illinois.

May 29, 1946.

(Letterhead of)

371 PLAINTIFF'S EXHIBIT 1.

Order No. ..... Date 3/16/44 19....
M .....
..... International Industries .....
Ship to .....600 So. Michigan Ave. .....
At ..... Chicago .....
How Ship .....Globe Liquor Co. .....
Terms .....Wilmington, Del. .....When .....
Salesman ..... Buyer .....

750 cs 5's Tequila 10.50
(Mariachi Gold)
C. I. F. Laredo, Tex.
60 day letter of credit
Import license I-1408
Globe Liquor Co.
By M. L. Lazarus
Gabriel Todes — 903 Lake Dr.
Mad 2112

372 PLAINTIFF'S EXHIBIT 2.

(Letter Head of)
GABRIEL H. TODES,
903 Lake Drive
Baltimore 17, Maryland

March 24, 1944

Mr. Morton Lazarus
Globe Liquor Company
18th and Market Streets
Wilmington, Delaware

Dear Mr. Lazarus:

This will confirm our telephone conversation of this morning relative to your order of Mariachi Tequila Gold, wherein the price for the Gold is $10.75, which is 25c more than the White, and which was agreeable to you.

Will you please forward to me your confirmation on this price, as I have already advised International Industries to cable your order to Mexico.

Please execute your letter of credit exactly in accordance with the form which I left with you, with the exception of changing the price from $10.50 to $10.75, and substituting your own customs broker in the place of Jovita Perez, if you so desire.

I wish to take this opportunity to thank you again for your patronage.

Kindest regards;
Gay Todes,
Gabriel H. Todes

ght/pn
cc: International Industries

373 PLAINTIFF'S EXHIBIT 3.

Zone 246

March 27, 1944

Mr. Gabriel H. Todes
903 Lake Drive
Baltimore, 17, Maryland

Dear Gabe:

This confirms our order placed with you last week for 750 cases of Mariachi Tequila Gold @ $10.75 f.o.b. Laredo, Texas. We have put through the letter of credit

in accordance with the specimen you left here, but I changed to Tequila where you had the word Vodka.

Be sure to instruct the International Industries that these cases cannot come into Delaware without the Delaware State stickers which will be sent to any address that is specified when they notify us that the shipment is ready to come forward.

These stickers are only sent after we have paid the state tax, so that you should wire us in ample time for us to pay the tax and have these stickers forwarded—one to be put on each case.

Trusting that this is clear to you and with kind personal regards,

Very truly yours,
Globe Liquor Co., Inc.
s/ *Morton Lazarus*
Vice President

ML:MS

374 PLAINTIFF'S EXHIBIT 4.

(Letterhead of)

THE CHASE NATIONAL BANK
Of the City of New York
Pine Street Corner of Nassau
New York

Irrevocable
Commercial
Letter of Credit
No. 25668

Cable Address
Chasebank, New York
.....$8,062.00.....
March 29, 1944

International Industries
600 S. Michigan Avenue
Chicago, Illinois

Gentlemen:

We hereby authorize you to draw on *The Chase National Bank, New York*

By order of *Wilmington Trust Company*
Wilmington, Delaware

And for account of *Globe Liquor Co. Inc.*
Up to an aggregate amount of *Eight Thousand Sixty-two Dollars and Fifty cents. (U.S. Currency)*

Available by your drafts at *sight for full invoice value, payable at First National Bank of Chicago, Chicago, Illinois, accompanied by: Mexican Shippers' Commercial Invoice in triplicate, showing "750 cases of Tequila (Gold color) at $10.75 per case, CIF Laredo, Texas"*

Consular invoice in duplicate

Insurance certificate

Original bill of lading issued to order of Mexican Shipper blank endorsed evidencing shipment of 750 cases of Tequila to Laredo, Texas.

.....Partial shipments are not permitted.

.....Of the above documents the original consular invoice and original bill of lading are to be forwarded by the negotiating bank direct to Jovita Perez, 112 Convent Ave., Laredo, Texas. Certificate to this effect and the remaining documents are to accompany the draft.

.....This credit may be assigned, provided the assignee is a person, firm or corporation in whose favor the issuance of this credit is permissible under the Trading with the Enemy Act of the USA and Executive Orders and * *

Drafts must be drawn and negotiated not later than *May* 28, 1944

Each draft must state that it is "Drawn under Letter of Credit of the Chase National Bank, New York, No. 25668 dated March 29, 1944", and the amount endorsed on this letter of credit.

We hereby agree with the Drawers, Endorsers, and bona fide holders of all drafts drawn under and in compliance with the terms of this credit, that such drafts will be duly honored upon presentation to the Drawee.

* * *Regulations issued thereunder. Should drafts under this credit be drawn by assignee they must be accompanied by your letter of assignment.*

Yours very truly,
J W

.....
Second Vice President
Assistant Cashier
EB

.....
Assistant Manager, Foreign Department

AS-ds

(Italics indicate typewriting.)

NON-NEGOTIABLE COPY
F. X. 336A 7-42
(Note: Above italicized words in typewriter.)

75 PLAINTIFF'S EXHIBIT 5.

(Letter Head of)

INTERNATIONAL INDUSTRIES
600 South Michigan Avenue
Chicago 5, Illinois, U.S.A.

Telephone
Harrison 3266

April 1, 1944

Globe Liquor Company Inc.
Wilmington, Delaware

Gentlemen:

We are sending herewith copy of letter addressed to the Wilmington Trust Company of Wilmington, Delaware in which we acknowledge receipt of L/C No. 25668 in the amount of $8,062.50. We are also sending copy of L/C as established by The Chase National Bank of the City of New York by order of Wilmington Trust Co.

Likewise, we are sending a revised form of the credit as it should be. You will note that we have made two or three changes as follows:

1. Mexican shipper's commercial invoice in triplicate showing 750 cases Mexican Tequila (Gold Color) at $10.75 per case, *Inbond* CIF Laredo, Texas. We are thus interpolating the words *inbond* which do not appear on the original letter of credit.
2. Since yours represents only one-half of the entire car of 1,500 cases, the original bill of lading will have to be modified to indicate that the bill of lading will cover the entire lot of 1,500 cases and we have changed the wording of the original credit to read as follows: Original bill of lading, issued to order Mexican shipper, blank endorsed, evidencing shipment of 1,500 cases of Tequila to Laredo, Texas, it being understood that the balance of 750 cases represents a separate shipment included in the same car and destined for another consignee.

With the above changes referred to, the credit in our opinion would be in order.

Monday we expect to have additional labels from Mexico and we will send them to you for registration.

Yours very truly,
International Industries
F. San Roman,
Managing-Director

F. San Roman:pm.
enc.
cc: G. H. Todes.

376 PLAINTIFF'S EXHIBIT 6.

REVISED FORM

The Chase National Bank of the City of New York
Pine Street Corner of Nassau $8,062.50

No. 25668
International Industries or Assigns
600 S. Michigan Avenue
Chicago, Illinois
Gentlemen:
We hereby authorize you to draw on The Chase National Bank, New York by order of Wilmington Trust Company; Wilmington, Delaware
and for account of Globe Liquor Co. Inc.
up to an aggregate amount of Eight Thousand Sixty-Two dollars and Fifty cents (U.S. Currency)
available by your drafts at sight for full invoice value, payable at First National Bank of Chicago, Chicago, Illinois
Accompanied by:

Mexican shipper's commercial invoice in triplicate showing 750 cases of Tequila (Gold Color) at $10.75 per case, *Inbond* CIF Laredo, Texas.

Consular invoice in duplicate

Insurance certificate

Original bill of lading, issued to order Mexican shipper, blank endorsed, evidencing shipment of 1500 cases Tequila to Laredo, Texas, it being understood that the balance of 750 cases represents separate shipment included in the same car and destined for another consignee.

Partial shipments not allowed.

.....Of the above documents the original consular invoice and original bill of lading are to be forwarded by the negotiating bank direct to Jovita Perez, 112 Convent Ave., Laredo, Texas. Certificate to this effect and the remaining documents are to accompany the draft.

.....This credit may be assigned, provided the assignee is a person, firm or corporation in whose favor the issuance of this credit is permissible under the Trading with the Enemy Act of the USA and Executive Orders and Regulations issued thereunder. Should drafts under this credit be drawn by assignee, they must be accompanied by your letter of assignment.

Drafts must be drawn and negotiated not later than May 28, 1944.

Each draft must state that it is "drawn under letter of credit of The Chase National Bank, New York, No. 25668, dated March 28, 1944", and the amount endorsed on this letter of credit.

We hereby agree with the drawers, endorsers, and bona fide holders of all drafts drawn under and in compliance with the terms of this credit, that such drafts will be duly honored upon presentation to the drawee.

Yours very truly,

AS-dc

377 PLAINTIFF'S EXHIBIT 7.

(Western Union Form)

PZA283 WUCA730 (Nine) NL—VH ICAGO ILL 10—

APR 10 PM 11 42

Globe Liquor Co Inc
(Wilmington Delaware)

—Under New Mexican Federal Revenue Regulations original Commercial Invoice Which Bears Revenue Stamps Must Accompany Tequila Shipment Please Therefore Request Your Bank to Amend Crdit to Accept Copies of Mexican Shippers Commercial Invoice Instead of Original Please Wire Confirming Disrgard Other Amendment Requested Our Letter April First

International Industries

Telephoned to..... G.H. .....
835A
....Ea..... Mld .....

The Company will appreciate suggestions from its patrons concerning its service.

378 PLAINTIFF'S EXHIBIT 8.

(Form of)

Federal Security Agency

FOOD AND DRUG ADMINISTRATION
12-4 U. S. Customhouse, Phila-6, Pa.

July 12, 1944

John A. Steer & Co.
Drexel Building,
Philadelphia-6, Pa.

Lab. No. P-5300

Sir:

Inspection and analysis of the sample from the following-described shipment having led to the result indicated below, you are hereby notified that action under the provisions of the Federal Food, Drug and Cosmetic Act, June 25, 1938, as to the exclusion of said shipment from consumption in the United States will be taken at the station of the Federal Security Agency at the above address three days (Sundays and holidays not included) from the above date, at which time and place you may be present and submit testimony, or at or before which time you may file a statement in writing.

(swm)
cc to: Collector 2
" Wilmington, Del. - 1

Respectfully,
C. S. Brinton,
C. S. Brinton, Chief of Station

DESCRIPTION OF SHIPMENT

Lab. No. P-5300 Label "Mariachi Tequila Imported, Prod. of Mexico 100 proof 4/5 Quart"

Broker-Consignee John A. Steer & Co., Drexel Bldg., Phila. Globe Liquor Co., Inc., Wilmington, Del.

Shipper-Manufacturer Gonzalo A. Larrea, S de R. L. Mexico, D.F.

Marks S M 1/750 750 cs.—9000 bottles—1800 gals.
Value: $8062.50
Cons. Invoice Mexico 5872 5-23-44
Sample taken (date) 7-11-44 (3 bots).
(Date Importer notified) 7-11-44
Steamer Int. R.R. & P. R.R. (via Laredo)
Entry No.-I. T. No.—WH-IA (Wilmington)
Action—Detained (Date) 7-12-44
Place of production Mexico
(Is dec. of shipper lacking) No

Results of analysis: It is adulterated under Section 402 (a) (1) of the Food, Drug & Cosmetic Act of 1938 since it contains a foreign substance dangerous to health —glass particles.

F.D. 777 Importer Date of Hearing

379 PLAINTIFF'S EXHIBIT 9.

COPY

(Form of)

U. S. TREASURY DEPARTMENT
FEDERAL SECURITY AGENCY
Food and Drug Inspection Service

Office of the Collector

Lab. No. P-5300

District No. 11 Port of Phila., Pa. January 16, 1945

Sir:

The examination of shipment of 750 cases (9,000 bots.) "Mariachi Tequila" consigned to Globe Liquor Co., Inc., Wilmington, Delaware
per S.S. Int. R.R. & P. R.R. (Via Laredo) Entry No. WH-LA (Wilmington) Marks and Number S M 1/750 750 cs. — 9000 bottles has been completed and found not to comply with the provisions of the Federal Food, Drug and Cosmetic Act of June 25, 1938, in that it is adulterated under Section 402 (a) (1) of The Food, Drug and Cosmetic Act since it contains a foreign substance dangerous to health—glass particles.

January 16, 1945, Statement of Conditions to be Fulfilled:

This importation was detained July 12, 1944, copy of detention notice being sent to the Collector at Wilmington, Delaware. No reply being received to same, this of-

fice issued the second and last notice January 2, 1945. Inasmuch as no reply has been received to our second and last notice, it is recommended that the goods be destroyed or exported under Customs supervision. Kindly notify this office on reverse side of this notice when and how the goods have been either destroyed or exported.

(sym)

cc to: Collector, Phila., Pa. (1)
Broker - John A. Steer & Co., Phila., Pa.

In case of failure to comply with the instructions stated above within three months from date of this notice, you are directed to return the above-described merchandise to the Collector of Customs, or action will be taken upon your bond given in compliance with section 801 *of the said act. When the conditions have been complied with, and the merchandise is ready for inspection, notify Chief of Station by delivery of this notice properly certified on top of reverse, to Room No.* 1204 *U. S. Customhouse, Philadelphia-6, Pa.*

To: Collector of Customs, U. S. Customhouse,
Wilmington, Delaware

Robert C. Stanfill,
Acting Chief, Phila. Station,
Collector

F.D. 776 a (over)

379½ PLAINTIFF'S EXHIBIT 10.

Globe Liquor Co., Inc.
P-5300

Commonwealth of Pennsylvania,
County of Philadelphia—ss.

Before me, Regina M. Sullivan, an employee of the Federal Security Agency, Food and Drug Administration, designated by the Federal Security Administrator, under authority of the Act of January 31, 1925, c. 124, sec. 1, 43 Stat. 803, and Reorganization Plan No. IV, Secs. 12-15, effective June 30, 1940, to administer or take oaths, affirmations and affidavits, personally appeared Robert C. Stanfill, in the Commonwealth and County aforesaid, who being first duly sworn, deposes and says:

I am an employee of the United States Government and I am Chief of the Philadelphia Station of the Food and

Drug Administration of the Federal Security Agency, which Agency is charged with the enforcement of the Federal Food, Drug and Cosmetic Act; that records on file in the said Food and Drug Administration, and which I have examined, show that a duly authorized wharf examiner of the Food and Drug Administration examined in possession of a United States bonded warehouse in Wilmington, Del., and collected from the bonded warehouse samples labeled, in part, as follows:

Sample—Laboratory No. P-5300
Product—Tequila
Label—"Mariachi Tequila Imported Prod. of Mexico 100 proof 4/5 quart."

That the shipment examined and sampled under No. P-5300 was from a lot of 750 cases of 12 bottles each covered by Entry WH-LA (Wilmington) Tequila 750 cs. (9000 bottles) S M 1/750 from Gonzalo A. Larrea, S de R. L. Mexico;

That on July 11, 1944, a representative of the Philadelphia Station of the Food and Drug Administration examined four cases or 48 bottles, the four cases having been taken at random without any selection;

That in the 48 bottles examined, he found present in 5 bottles what appeared to be particles of glass;

That he took as samples three of the 5 bottles in which glass particles appeared to be present and proceeded with them to the laboratory of Philadelphia Station of the Food and Drug Administration where examination of the particles in each of the three bottles showed the particles to be glass;

That notice was given the importer on July 11, 1944 and that a written notice was issued on Form FD-777, Importer-Date of Hearing" on July 12, 1944, the notice of detention being sent to John A. Steer, Drexel Building, Philadelphia 6, Penna. with copies going to the Collector of Customs, Philadelphia, Penna., and Deputy Collector of Customs, Wilmington, Del. The notice bore notice that testimony could be given or a written statement could be filed in writing within three days after the notice; also "description of shipment", and "results of analysis:

'It is adulterated under Section 402 (a) (1) of the Food, Drug and Cosmetic Act of 1938 since it contains a
foreign substance dangerous to health—glass par-
380 ticles.'";

That no response having been received, an identical notice was sent to John A. Steer, et al., on January 2, 1945, on which was conspicuously stamped "Second and Last Notice. Shipment will be Refused Entry if you Fail to Reply";

That no response or testimony was offered; therefore, the case was closed by this office on January 16, 1945 by an order for destruction or exportation of the goods, this order having issued on Form FD-776a;

That the procedures followed by the Food and Drug Administration were those customarily followed by Philadelphia Station under similar circumstances; and that the procedures followed were adequate to demonstrate that the shipment of Tequila is adulterated under Section 402 (a) (1) of the Federal Food, Drug and Cosmetic Act of 1938 in that it contains a foreign substance which is dangerous to health; namely, glass particles.

Robert C. Stanfill
Robert C. Stanfill
Chief, Philadelphia Station

Subscribed and sworn to before me at Philadelphia, Penna., this 6th day of February, 1946.

Regina M. Sullivan,
Employee of the Federal Security Agency designated under the Act of January 31, 1925, and Reorganization Plan No. IV, effective June 30, 1940.

381 DEFENDANTS' EXHIBIT 1.

(Letterhead Of)
Globe Liquor Co., Inc.
Wholesale
Liquor - Wines - Beers
18th & Market Streets
Wilmington, Delaware, Zone 246.
Phone 3-6128

April 21, 1944.

International Industries,
600 S. Michigan Avenue,
Chicago 5, Illinois.

Gentlemen:

We have your air mail letters of the 17th and 19th respectively.

We were under the impression that you thought a Delaware stamp had to be affixed to each bottle as is the case in some states, and for this reason we were trying to be explicit in telling you that there was no state stamp to go on the bottle, but one label is to go on the case. These went air mail the 17th.

We thought that you were going to furnish the Federal strip stamps and this is where the confusion arose. These 9,000 strip stamps were sent by air mail on Wednesday, April 19, 1944. These, however were not imprinted, so make sure that they are properly imprinted at the distillery, otherwise we are going to be in a bad position if the shipment comes to Delaware with the stamps not properly printed.

I took the matter up with Mr. Todes over the telephone and he assured me that all would be taken care of at the distillery. We have no broker here, and will thank you to get in touch for us with Jovita Perez and have her see that this shipment is properly forwarded to us upon its arrival at Lareda and bill us with any charges involved.

We have received the label approval through Mr. Denslow of course these labels also will have to be properly imprinted at the distillery.

We trust that all of this is now clear, and that this shipment will be coming out at an early date.

Very truly yours,
Globe Liquor Co., Inc.
M. L. Lazarus,
Vice President.

ML:MS

382 DEFENDANTS' EXHIBIT 2.

(Letterhead Of)
Globe Liquor Co., Inc.
Wholesale
~~Liquor - Wines - Beers~~
18th & Market Streets
Wilmington, Delaware, Zone 246.
Phone 3-6128

April 27, 1944.

Pine Needle de Mexico, S. de. R. L.
Cerrada Rio de Janeiro 9,
Mexico, D. F. Mexico.

Gentlemen:

We sent you two (2) packages by Air Mail in connection with the 750 cases of Tequila purchased through International Industries; one (1) package contained yellow case labels from the Delaware Liquor Commission. Please paste *one of these labels on each of the* 750 *cases* and destroy any labels left over, but make sure that you ship nothing in excess of that quantity.

The other package contained 9,000 U. S. Government strip stamps. These stamps were not imprinted here, so you will make sure that on the blank space left for imprinting you will have printed:—

Globe Liquor Co., Inc.
Wilmington, Delaware.

No doubt you have had other stamps printed and are familiar with this requirement. Trusting that all of this is now clear to you.

Very truly yours,
Globe Liquor Co., Inc.
M. L. Lazarus,
Vice President.

Ml:ms

382A DEFENDANTS' EXHIBIT 3.

(Western Union Form)

Z6N GG 14 Collect

Wilmington Del 1024 A May 17 44

Intl Industries
600 S Michigan Ave Chicago Ill

Our bank advises they have authorized Chase to extend credit to June 15

Globe Liquor Co.
954 A

382B DEFENDANTS' EXHIBIT 4.

(Letterhead Of)
International Industries.

May 10, 1944.

600 South Michigan Avenue
Chicago 5 Illinois, U.S.A.

Telephone Harrison 3266

Globe Liquor Co., Inc.,
18th & Market Streets,
Wilmington 246, Delaware.

Att.: Mr. M. L. Lazarus, Vice President.

Gentlemen:

We are attaching photostatic copy of Affidavit issued by the shipper in connection with the price of Mariachi Tequila, which might be of use to you for the purpose of establishing your ceiling price.

However, please bear in mind that this affidavit is based on Mariachi Tequila White, whereas your order calls for Mariachi Tequila Gold, accounting for the difference of 25 cents additional per case.

Yours very truly,
International Industries,
F. San Roman,
Per P. M.
Managing-Director.

F. San Roman: pm
enc.
cc: G. H. Todes.

384 DEFENDANTS' EXHIBIT 5.

La Mexicana
Casa Rubio
Tenampa, S. A.
Gonzalo A. Larrea, S. de R. L.
(Letterhead Of)
Importaciones y Exportaciones
Oficina en New York York, U.S.A.

Affidavit.

We offer Tequila Mariachi, at 100 proof, 12/5ths at Dls. 10.50 per case f.o.b. Laredo, Texas.

We hereby certify that we have not sold this brand or this product under any other brand at a lower price—prior to or since April 30, 1943.

The foregoing is executed in the City of Mexico, Federal District thereof.

Gonzalo A. Larrea, S. De R. L.
Javier de J. Valencia,
Manager.

United Mexican States
Mexico, Federal District,
Embassy of the United
States of America.

Subscribed and sworn before me this 28th day of April, 1944.

Terry B. Sanders, Jr.
Terry B. Sanders, Jr,
Vice Consul of the United States of America.

(Seal)

Service No. 3752 Tariff No. 38 Fee: 2.00 U. S. paid by American Foreign Service Fee Stamp $2.00 affixed.
10.00 Pesos.

385 DEFENDANTS' EXHIBIT 6.

(Letterhead Of)
Jovita Perez.
Licensed U. S. Customs Broker.
Laredo, Texas.

May 27, 1944.

Air Mail.
International Industries,
600 South Michigan Ave.,
Chicago 5, Ill.

Gentlemen:

Re: Combination Mariachi Tequila a/c
Alex J. Mandl; Hagerston, Md. (CI-4605)
James A. Goethe Wholesale Liquors, Inc.
Savannah, Georgia (CI-4616
My Refs. 2785, and 2755.

Yours of the 25th inst. relative to above shipments received.

Please be advised that I have received documents from Banco de Comercio, S. A., Mexico, D. F., covering combination shipment of Mariachi Tequila in Car R. I. 159322 as follows:

Letter of Credit No. (GC-20040).
My Ref. 2951: 750 Cs. for Globe Liquor Co. Inc. 18th & Market St., Wilmington 245, Delaware.
Shipper: Gonzalo A. Larrea, S. de R. L.
Documents received:
Original True Bill of Lading No. D-4503; and Original Consular Invoice No. 5872.

(Letter of Credit No. GC-20108).
My Ref. 2785:
750 Cs. for: Alex Mandl Inc., Hagerstown, Maryland, Shipper: Gonzalo A. Larrea, S. de R. L.,
Documents received:
Original Thru Bill of Lading No. D-4504; and Original and Quadruplicate of Consular Invoice No. 5212.

I will kill the billing in New Laredo, Mexico and will reconsign to Wilmington, Delaware with stop-over at Baltimore, Maryland, for partly unloading (750 cases).

Yours truly,
Jovita Perez.
L. Hinjisa

JP:LH

Samuel Shapiro & Co., Baltimore, Md.,
Alex J. Mandl, Inc., Hagerstown, Md.,
James A. Goethe Wholesale Liquors, Savannah Ga,
Globe Liquor Co., Wilmington, Delaware.

386 DEFENDANTS' EXHIBIT 7.

International Industries.
600 South Michigan Avenue.
Chicago 5, Illinois, U. S. A.

Telephone Harrison 3266

May 27, 1944.

Globe Liquor Co., Inc.,
18th and Market Streets,
Wilmington, Delaware.

Att.: Mr. M. L. Lazarus.

Gentlemen:

We are pleased to advise that your lot of Mariachi Tequila was shipped from Mexico on May 22nd in Car RI-159322. We would suggest therefore, that you communicate with your broker in Laredo.

Yours very truly,
International Industries,
F. San Roman,
Managing-Director.

F. San Roman
PM
cc: G. H. Todes.

387 DEFENDANTS' EXHIBIT 8.

Declaration of Shipper of Food, Drug, and Cosmetic Products.

Regarding shipment covered by Invoice No. 5872, certified at Embassy of the *United States of America, Mexico, D. F., Mexico, on May* 23, 1944.

I, the undersigned, am the *owner* of the merchandise

mentioned and described in the accompanying consular invoice. It consists of food, drug or cosmetic products (or devices as defined by the Federal Food, Drug, and Cosmetic Act) which contain no added substance injurious to health. These products were grown in *Mexico* and manufactured in *Mexico* by *Gonzalo A. Larrea, S. De R. L.*, during the year 1944, and are exported from *Mexico* and consigned to *Wilmington, Delaware, U. S. A.* They Bear no false labels or marks, contain no added coloring matter except *Ninguna* no preservative (salt, sugar, vinegar, or wood smoke excepted) except *Ninguna.*

I further declare that such article or articles are not of such a character as to prohibit their entry into the United States in accordance with the provisions of the Federal Food, Drug, and Cosmetic Act in that they have not been manufactured, processed or packed under insanitary conditions, nor are they of a character to cause prohibition or restriction in sale in the country where made or from which exported, nor are they adulterated or misbranded, nor are they in violation of sention 505 of the Federal Food, Drug, and Cosmetic Act.

I further declare that the drug products herein mentioned and described contain no opium, coca leaves, cocaine, or any salt, derivative or preparation of opium, coca leaves, or cocaine, the importation of which into the United States is prohibited by the Narcotic Drugs Import and Export Act, as amended.

I do solemnly and truly declare the foregoing statements to be true, to the best of my knowledge and belief.

Dated at *Mexico, D. F.* this 23rd day of *Mayo De* 1944.

(Signature) *Gonzalo A. Larrea.*

(Above italicized words in typewriter.)

Instructions to Consular Officers

1. This declaration is to be firmly attached to all copies of consular invoice covering shipment of over $100 in value.

2. The official seal must be placed on the declaration, and the number, date of certification of invoice, and name of post plainly indicated.

3. Shipper should be instructed to declare the name of the manufacurer whenever possible.

4. If the declaration is believed to be incorrect or incomplete, or if consul believes that the goods are liable to detention, he should note such information on the invoice in the consular corrections or remarks column.

Defendants' Exhibit 9

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DUPLICATE

—Attach Additional Sheets Here—

5872

INVOICE OF MERCHANDISE

(Before preparing this invoice, read instructions carefully)

(1) Purchased ☒ (2) Not Purchased ☐

(Do not include PURCHASED and NOT PURCHASED merchandise in same invoice. Make separate invoice for each.)

MEXICO, D.F. MAY 23 DE 1944.

(Place and date)

LICORES-TEQUILA "MARIACHI"

(Seller or consignor) (3) { purchased from / agreed to be purchased from

GONZALO A. LARREA, S. DE R.L.

(Purchaser or consignee) of WILMINGTON, DELAWARE, U.S.A.

GLOBE LIQUOR CO. INC.

MAY 8 DE 1944, (Address)

as per order accepted (Date)

for the account of FERROCARRIL of (Address)

shipped per (Carrier)

(5) Marks and numbers on packages	(6) Number of packages; Kind of packages; Description of goods	(7) Quantity (Market or Customary)	(8) Quantities and Full Description of Goods (If Re-shipment, give marks and numbers of original packages, and all other marks, charges, and exceptions)	(9) Invoice Unit Price (Foreign Currency)	(10) Invoice Total (Foreign Currency)	(11) Currency Point (Name of country) Par Value
[illegible]	KINGSBRO	KINGSBRO	750 CAJAS DE MADERA PESAN..	M.N.	M.N.	IGUAL A (9)
750.			50 BRUTOS/U. 20.262 KILOS			
			C/U. 12 BOTELLAS DE 4/5 QT.			
			TEQUILA "MARIACHI" COLOR ORO			
			OSCURO DE 100 PROOF. Y 50%			
ISO DE EXPORTACION			S.L.-PESO DE 12 BOTELLAS Y/A			
RICANO $ 1.1490.			CAJAS 6.262 KILOS CONTENIEN			
			DO EN TOTAL 1,800 GALONES.	10.75	8,062.50	

ad carefully Instructions 1 and 9 before answering the first three following questions.) SI

his merchandise shipped in pursuance of a purchase or an agreement to purchase? (Yes or No)

answer to preceding question is "Yes," have you entered as Item 9 the purchase price of each item in the currency of purchase? NO

(Yes or No)

lis merchandise shipped otherwise than in pursuance of a purchase or an agreement to purchase? (Yes or No) If answer is "Yes," indicate below whether you have entered as Item 9 the present value for each item in the currency in which the transactions are usually made: (a) the value for home consumption including all applicable taxes in the country of exportation; or (b) the export value to the United States if higher; or (c) in the absence of the foreign value and the export value, the price in such currency that the manufacturer, seller, shipper, or owner would have received, or was willing to receive for such merchandise if sold in the ordinary wholesale quantities in the country of exportation; or (d) in the absence of all of the foregoing, the cost of production. (State whether (a), (b), [illegible] MEXICANA

he currency, entered as Item 9, gold, silver, or paper? (State which)

ve you enumerated all charges and stated whether each amount has been included in or excluded from the above invoice amounts? SI If the inland freight is included in the invoice price or value, is the price or value of the merchandise the same (Yes or No) NO at the factory as at the point of delivery? (Yes or No)

[illegible]ely itemized all rebates, drawbacks, bounties, or other grants allowed upon the exportation of the merchandise? (Yes or No)

SI

ch or similar merchandise offered or sold in the home market for home consumption? (Yes or No) If so, what taxes are applicable? TIMBRES COMPRA-VENTA, RECIBOS Y ADICIONAL. GONZALO A. LARREA, S. DE R.L.

(Date and Sign)

hen invoice is signed by an horized agent the name of principal must be shown.)

Signature of Seller or Shipper

By GONZALO A. LARREA.

(Authorized agent)

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Defendants' Exhibit 10

Plaintiff's Exhibit
In the District Court of the United States
Northern District of Illinois, Eastern Division
No.
Jay C. Ford - Official Court Reporter

DUPLICATE 5872

AMERICAN EMBASSY
Consular Section
Mexico, D. F., Mexico

Copies

MAY 23 1944
(Date)

SPECIAL CONSULAR CERTIFICATE
(Pursuant to General Imports Order M-63, as amended)

I hereby certify that the shipper of the merchandise described in consular invoice no. 5872 has declared that he has been informed by the consignee that the importation of the goods covered by this certificate meets with the requirements of General Imports Order M-63 since #

☐ (1) the consignee is a United States Government Corporation or other United States Government agency, viz. the _____

☐ (2) the consignee (a) is acting agent for the _____ a United States Government corporation or other United States Government agency, or (b) is importing a commodity purchased from the _____ a United States Government corporation or other agency of the United States Government.

☐ (3) the consignee has been granted an exemption from the War Production Board to import the merchandise and that the letter of authorization bears number _____

☒ (4) the commodity imported does not appear on list I, II or III of General Imports Order M-63.

☐ (5) the shipment is exempt under supplemental General Imports Order M-63-a as amended September 8, 1942, because it consists of materials on List III, produced in Mexico and transported in to the continental United States overland, by air, or by inland waterway from Mexico.

GONZALO A. LARREA, S.DE.R.L.

(Signature of shipper or shipper's agent)

GONZALO A. LARREA.

R. Battinello

Vice Consul of the United States of America

R. Battinello

#Place "X" in square opposite paragraph applicable.

NO FEE

389 DEFENDANTS' EXHIBIT 11.

(Western Union Telegram)

NA260 NL—Mexico City Via Mextel July 21

1944 Jul 22 P M 4 56

Globe Liquor Co Inc
18th and Market St Wilmington Del

International Industries advise 750 cases Tequila shipped you on May 23rd rejected Pure Food authorities account containing glass particles stop although cannot understand how this happened in order render merchandise salable under your laws we hereby authorize you to filter and rebottle said 750 cases at our expense.

Gonzalo A Larrea.

390 DEFENDANTS' EXHIBIT 12.

(Letterhead of)
Gabriel H. Todes,
903 Lake Drive
Baltimore 17, Maryland.

July 12, 1944.

Mr. Wolf,
Globe Liquor Company,
18th & Market Streets,
Wilmington, Delaware.

Dear Mr. Wolf:

In accordance with our conversation on the phone last evening, I have written to International Industries explaining the situation to them, and notified them that you, too, were writing them.

I would suggest that you obtain two copies of an application form which is necessary in rder to go through the process of filtering the merchandise and rebottling it, which will be done under the supervision of the Food and Drug Administration whose offices, I think, are in Room 300 U. S. Appraisers Building, Gay and Water Streets, Baltimore 2, Maryland. I believe they will advise you where this can be done. In the event they don't know, or are not able to do so, I would suggest that you contact one of the rectifiers here in Baltimore, either United Distillers, Union Distillers, or Dundalk Liquor Company.

I regret extremely the occurrence of this situation, as it is the first time a shipment has been made, of all the thousands of cases from Mexico, in which there has been any trouble with the merchandise.

Of course, you understand that I have only acted in the capacity of a broker in bringing together a buyer and a seller, but I can assure you I will do everything I possibly can to help put you in a position to sell this merchandise.

Kindest regards,
Guy Todes
G. H. Todes.

ght/pn

391 DEFENDANTS' EXHIBIT 13.

(Letterhead of)
Globe Liquor Co., Inc.
Wholesale
Liquor - Wines - Beers
18th & Market Streets
Wilmington, Delaware, Zone 246.
Phone 3-6128

July 24, 1944

International Industries,
600 S. Michigan Avenue,
Chicago 5, Illinois.

Gentlemen:

We are in receipt of a telegram from your principals in Mexico in which they authorize us to have the 750 cases of Tequila filtered and rebottled. This is an impossibility, as in the first place there are no rectifiers or bottling plants in Delaware and we have our doubts whether any firm would be willing to tackle this job, as all of this rebottling and refiltering would have to be done in bond as we certainly would not tax pay this whiskey. Anyone large enough to have a bonded warehouse would not want to be annoyed with handling this class of work.

The amount of time consumed in getting all of this rebottled and relabeled would be so great that this merchandise would be unsaleable under present conditions here. In view of all of the above we must insist upon your refunding us the amount of money outlayed by us as was mentioned in our letter to you of the 20th.

Had this shipment come through in good order, we could have doubtless disposed of it without much difficulty. The order was placed in good faith, but you can well see that a further delay in getting this merchandise in shape would make it impossible for us to move any of it at this late date.

Very truly yours,
Globe Liquor Co., Inc.,
M. L. Lazarus,
Vice President.

ML:MS

392 DEFENDANTS' EXHIBIT 14.
(Letterhead of)

Phone 3-6128

Globe Liquor Co., Inc.
Wholesale
Liquor - Wines - Beers
18th & Market Streets
Wilmington, Delaware, Zone 246.

July 27, 1944

International Industries,
600 S. Michigan Avenue,
Chicago 5, Illinois.

Gentlemen:

Replying to yours of the 26th inst., we wish to advise that we will be unable to use the Tequila, as the length of time required to recondition this merchandise would make it impossible to dispose of this, in view of the present liquor market conditions.

We only know you through this transaction, therefore you are the one that we look to for reimbursement, and you in turn are to look to your principals. We do not wish to be unreasonable, but we cannot permit this matter to drag any longer.

This order was placed in good faith, and had the merchandise arrived in good condition there would have been no trouble whatsoever.

We trust that you will avoid all unpleasantness by mailing us your check by return mail.

Very truly yours,
Globe Liquor Co., Inc.,
M. L. Larazus,
Vice President.

ML: MS

393 And afterwards on, to wit, the 14th day of March, 1946 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion For Instructed Verdict in words and figures following, to wit:

394 IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 45 C 120 * *

DEFENDANT'S MOTION FOR INSTRUCTED VERDICT.

Defendants, Frank San Roman and Dorothea San Roman, at the conclusion of all the evidence offered by the parties in the case, move the Court to direct a verdict for the defendants upon the cause of action asserted in plaintiff's complaint, and to instruct the jury to return a verdict for the defendants.

The motion of the defendants is based on the following grounds:

(1) The undisputed evidence proves that before the plaintiff incurred any liability on its original order or under the terms of the letter of credit that it caused to be inssued, the plaintiff was informed that the shipper of the merchandise in question was Gonzalo A. Larrea, of Mexico City, Mexico, and that the defendants acted as the agents or brokers of said disclosed principal.

(2) At and prior to the time the plaintiff received this information, the plaintiff's original order was a mere request or offer to purchase the merchandise in question, which could be withdrawn at any time before being accepted by the shipper. The shipper had not notified the plaintiff that he had accepted said order
395 prior to the time the plaintiff was informed that the name of the shipper was Gonzalo A. Larrea, of Mexico City, Mexico.

750 23 750

(3) The burden of proof was on the plaintiff to prove that the merchandise was inferior, and the evidence that only a few bottles out of the entire shipment of 9,000 bottles were inferior did not justify the plaintiff in rejecting the entire shipment.

Nat M. Kahn
Attorney for Defendants.

Denied

395 And on the same day, to wit, the 14th day of March, 1946 there was filed in the Clerk's office of said Court a certain Verdict in words and figures following, to wit:

396 IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 45 C 120) • •

We, the Jury, find the issues for the defendant *guilty*, (italics scored out) and assess the plaintiff's damages at the sum of Nine Thousand seven hundred four Dollars and twenty-five cents ($9704.25)/100)

Wm. H. Grigg,
Foreman.
Evelyn G. Nelson
M. M. Koehler
Wm. Gardiner
Maria C. Marks
Gregory M. Kissinger
Walter I. Harast
Miriam R. Northshield
Odessa Donnelly
Grace Piest
Jeannette Boehmer
Glenn Y. Pangborn

397 And on the same day, to wit, on the 14th day of March, 1946, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

398 IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 45 C 120) • •

This cause this day coming on for further trial re Globe Liquor Co., Inc. v. Frank San Roman and Dorothea San Roman doing business under the firm name and style of International Industries again come the parties

to this suit by their attorneys, respectively, and the Jury heretofore empaneled and sworn herein also come and the trial of this cause proceeds. Both sides rest, the motion of the defendants for an instructed verdict in their favor is denied and the motion of the plaintiff for a directed verdict is entered, the arguments of counsel are heard and the Court being fully advised in the premises directs the Jury to render a verdict for the plaintiff and the Jury return their verdict in open Court and on their oath do say:

> "We, the Jury, find the issues for the plaintiff and assess the plaintiff's damages at the sum of Nine thousand seven hundred four Dollars and twenty-five cents ($9704.25/100)"

Therefore

It Is Considered And Ordered by the Court that the plaintiff, Globe Liquor Co., Inc., a Delaware Corporation, do have and recover of and from the defendants, Frank San Roman and Dorothea San Roman doing business under the firm name and style of International Industries, its damages herein in the sum of Nine Thousand Seven Hundred Four Dollars and Twenty-five Cents ($9,704.25) in form as by the Jury assessed, together with its costs and charges in this behalf expended and have execution therefor.

399 And afterwards on, to wit, the 22nd day of March, 1946 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Motion For A New Trial in words and figures following, to wit:

400 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 45 C 120) * *

DEFENDANTS' MOTION FOR A NEW TRIAL.

Now comes the defendants, Frank San Roman and Dorothea San Roman, by Nat M. Kahn, their attorney, and move this Court for an order setting aside the verdict and judgment herein and granting the defendants a new trial of the above entitled cause, for the following reasons:

(1) The Court at the time it directed the jury to return a verdict in favor of the plaintiff was under the misapprehension that the tequila in question had been destroyed by the United States Government. It appears from the accompanying affidavit of the defendant, Frank San Roman, that the tequila in question was not destroyed and is still in the custody of the United States Government; and that the plaintiff accepted said merchandise by the payment of storage thereon from July 7, 1944, to February 28, 1946, and that the plaintiff furnished to the United States Government a warehouse entry bond guaranteeing the payment of all duties, taxes and other charges until July 7, 1947.

(2) At the time the plaintiff delivered the defend-
401 ants the letter of credit issued by the Chase National Bank and the amendments and extensions thereunder, the shipper of the merchandise had not notified the plaintiff that its initial order of March 16, 1944, had been accepted. The delivery of this letter of credit to the defendants was part of the continuing unaccepted offer of the plaintiff to purchase the merchandise in question. Competent evidence was offered by the defendants that the name of the shipper of the merchandise was disclosed to the plaintiff by the defendants before the shipper ever accepted the plaintiff's initial order, and the plaintiff could have withdrawn or revoked its initial order and thereby cancelled any liability of any person under the letter of credit as soon as the plaintiff learned the identity of the shipper.

(3) The trial court disregarded the admission of Morton Lazarus, Vice President of the plaintiff corporation, who testified that he considered the defendants as brokers in the transaction. Mr. Lazarus testified that he had been in the liquor business all his life and was, therefore, completely familiar with the difference between a broker and a principal in a transaction.

(4) The Court erred in admitting incompetent evidence offered by the plaintiff.

(5) The Court erred in excluding competent evidence offered by the defendants.

(6) The Court erred in instructing the jury to return a verdict for the plaintiff and against the defendants, as the following contested questions of fact were pre-

sented by the evidence of both the plaintiff and the defendants:

402 A. Whether the plaintiff desired to purchase tequila directly from the shipper at Mexico and orally agreed to look only to the shipper for recourse for damages of any nature and agreed further not to look to the defendants for any recourse for any damages even if the name of the shipper had never been disclosed to the plaintiff.

B. Whether the plaintiff was justified in attempting to reject the acceptance of the entire shipment of Nine Thousand (9,000) bottles of liquor when only approximately Ten Per Cent (10%) out of this entire shipment was found to contain tequila unfit for human consumption.

C. Whether or not the plaintiff accepted the shipment regardless of its condition by the plaintiff paying the storage thereon from July 7, 1944, to February 28, 1946, and by furnishing a bond to the Government to pay all duties, taxes and other charges on said merchandise up to July 7, 1947.

D. Whether or not the act of the plaintiff in attempting to reject the acceptance of the entire shipment in view of the competent proof offered by the defendants as to the drop in the market price of the tequila at the time the plaintiff attempted to reject said entire shipment was justified.

E. Whether or not the shipper, Gonzalo A. Larrea, of Mexico City, Mexico, was relieved of any further duty to pay for the refiltering and rebottling of the merchandise in view of the refusal of the plaintiff to accept the telegraphic offer of the shipper to pay the cost of refiltering and rebottling the merchandise.

403 Defendants request that during the time the Court may consider this motion for a new trial, that the Court enter an order staying the execution on the judgment entered in this cause.

Nat M. Kahn,
Attorney for Defendants.

404. In the District Court of the United States

• • (Caption—No. 45 C 120) • •

Affidavit of Frank San Roman, Defendant, in Support of Defendants' Motion for a New Trial.

State Of Illinois,
County Of Cook—ss.

Frank San Roman, being first duly sworn, on his oath deposes and states, the following:

(1) Affiant is one of the defendants in the above entitled cause. Affiant makes this affidavit in his own behalf and in behalf of his wife, Dorothea San Roman, a co-defendant in this suit.

(2) Affiant was personally present at the trial of the above entitled cause when the Court, in response to a question of a juror as to the whereabouts of the Tequila in question, stated to this juror that the merchandise had been destroyed by the United States Government.

(3) Immediately after the Court directed the jury to enter a verdict in favor of the plaintiff and the Court entered judgment on this verdict, affiant and his attorney, Nat M. Kahn, communicated by telegram with
405 the Collector of Customs at Wilmington, Delaware, and received four (4) telegrams from him, copies of which telegrams are attached hereto marked respectively Exhibits "A," "B," "C," and "D," and by reference thereto are made a part of this affidavit.

Frank San Roman.

Subscribed and sworn to before me this 21st day of March, A. D. 1946.

(Seal) Lorraine Goldstrom,
Notary Public.

406 EXHIBIT "A".

Western Union

CW 139 14 Collect—Wilmington Del 18 126 P
International Industries 1946 Mar 18 P M 12 52
600 S Michigan Ave
Tequila imported by Globe Liquor Co is in storage here in Customs warehouse.
Deputy Collector of Customs.

407 EXHIBIT "B".

TELEGRAM
WESTERN UNION

W 1 A 121 86/85 Collect-Wilmington Del 19 155P
Nat M. Kahn C 658 1946 Mar 19 PM 1 06
33 South Clark St Suite 1757-Chgo

Warehouse entry bond in the amount of $25,300 has filed with the warehouse entry on July 7 1944 this bond guarantees the payment of all duties taxes and other charges and cannot be extended after the expiration date which is July 7 1947 if further information is desired concerning customs treatment of merchandise entered under bond suggest you contact collector of customs in Chicago $747 has been paid by Globe Liquor Co from July 7 1944 to Feb 28 1946 for storage of Tequila

Deputy Collector of Customs.

$25,300 7 1944 7 1947 $747 7 1944 28 1946

408 EXHIBIT "C".

TELEGRAM
WESTERN UNION

W I A 8 43 Collect Wilmington Del 19 848A
Nat M. Kahn C 198
33 South Clark St Chgo 1946 Mar 19 AM 8 17

Relative to your telegram of March 18th the Tequila imported by Globe Liquor Company will be held in storage until July 7 1947 at which time the bonded period expires there is no provision under the law to extend this bonded period

Deputy Collector of Customs

18 7 1947
Tequila

409 EXHIBIT "D."

Western Union

W IA 32 11 Collect—Wilmington Del 20 928 A

1946 Mar 20 AM 836

Nat M. Kahn—C 164
33 S Clark St Chgo

Warehouse entry bond was furnished by importer Globe Liquor Co.

Duputy Collector of Customs.

410 And on the same day to wit, on the 22nd day of March, 1946, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before Honorable John P. Barnes, District Judge, appears the following entry to wit:

411 In the District Court of the United States
For the Northern District of Illinois
Eastern Division

Friday, March 22, A. D. 1946

Present: Hon. John P. Barnes, District Judge

* * (Caption—No. 45 C 120 * * *

This cause this day coming on for hearing on the motion of the defendants by counsel for a new trial come the parties by their attorneys. The arguments of counsel are heard and the Court being fully advised in the premises It Is Ordered that said motion for a new trial be and it is hereby overruled and denied.

412 And afterwards, to wit, the 11th day of June, 1946 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Notice of Appeal in words and figures following, to wit:

413 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

(Caption—No. 45 C 120)

NOTICE OF APPEAL.

Notice Is Hereby Given that Frank San Roman and Dorothea San Roman, defendants-appellants above named, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the final judgment entered in this action on March 15, 1946, in favor of the plaintiff-appellee and against the defendants-appellants, in the sum of Nine Thousand, Seven Hundred Seventeen Dollars and Sixty-eight Cents ($9,717.68), and costs, and defendants-appellants request that said United States Circuit Court of Appeals for the Seventh Circuit reverse said judgment and remand this cause with instructions to the trial court to grant the motion of the defendants-appellants for an instructed verdict and to enter a judgment for costs in favor of the defendants-appellants and against the plaintiff-appellee.

Nat M. Kahn
Nat M. Kahn
Suite 1757 First Nat'l Bank Bldg.
33 S. Clark Street
Chicago 3, Illinois
Telephone: Central 3053
Attorney for Frank San Roman
and Dorothea San Roman,
Defendants-Appellants.

(Attached to the foregoing is the following certificate:)

414 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said Court, do

hereby certify that on the 12th day of June, 1946, in accordance with Rule 73 (b) of the Rules of Civil Procedure for District Courts of the United States, I did cause to be mailed a copy of the foregoing Notice of Appeal to the following attorney of record:

Ben W. Heineman
135 S. LaSalle St.
Chicago 3, Ill.
Suite 1406

Roy H. Johnson
Roy H. Johnson, Clerk

415 And on the same day, to wit, the 10th day of July, 1946 came the Defendants-Appellants by their attorneys and filed in the Clerk's office of said Court their certain Statement Of Points in words and figures following, to wit:

416 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 45 C 120) * *

DEFENDANTS-APPELLANTS' STATEMENT OF POINTS RELIED ON FOR REVERSAL OF JUDGMENT ENTERED BY THIS COURT ON MARCH 15, 1946, IN FAVOR OF PLAINTIFF-APPELLEE AND AGAINST DEFENDANTS-APPELLANTS.

The points upon which defendants-appellants intend to rely on their appeal to the United States Circuit Court of Appeals for the Seventh Circuit are as follows:

(a) The Court erred in entering judgment for the plaintiff-appellee and against the defendants-appellants in any sum.

(b) The Court erred in instructing the jury to return a verdict in favor of the plaintiff-appellee and against the defendants-appellants.

(c) The Court erred in denying the motion of the defendants-appellants for an instructed verdict and judgment in their favor at the conclusion of the plaintiff-appellee's case.

(d) The Court erred in denying the motion of the defendants-appellants for an instructed verdict and judgment in their favor at the conclusion of all of the evidence introduced and offered by both parties.

417 (e) The Court erred in denying the motion of the defendants-appellants for a new trial.

(f) The Court erred in admitting improper evidence in behalf of the plaintiff and against the defendants.

(g) The Court erred in excluding competent evidence offered by the defendants.

(h) The Court erred in the following rulings on the admissibility to evidence:

1. The Court erred in sustaining the objection of the plaintiff to defendants' question on the cross-examination of plaintiff's witness, Morton Lazarus, whether he ever received a written communication of any kind from Gonzalo A. Larrea advising Mr. Lazarus' firm that he accepted its order. (Transcript 96-97; hereafter, the abbreviation "Tr." will designate page of transcript of proceedings.)

2. The Court erred in sustaining the plaintiff's objection to the question of the defendants on cross-examination of plaintiff's witness, Morton Lazarus, as to whether there was a great demand for liquor of all sorts in the United States in March of 1944. (Tr. 103.)

3. The Court erred in sustaining the objection of the plaintiff to defendants' question on cross-examination of plaintiff's witness, Morton Lazarus, as to the length and extent of his acquaintance with Gabriel Todes. (Tr. 104.)

4. The Court erred in permitting Lee Eiseman, plaintiff's witness, to testify on direct examination as to the condition of the tequila purchased by Alex J. Mandl, Inc., and the Court erred in overruling the objection of the defendants to this testimony. (Tr. 127-128, 136, 137, 138, 139, 140, 141.)

418 5. The Court erred in sustaining the objection of the plaintiff to the direct examination of Frank San Roman, defendant, when he was asked whether his firm, International Industries, was in the liquor business. (Tr. 230.)

6. The Court erred in sustaining the objection of the plaintiff to the direct examination of Frank San Roman, defendant, when he was asked whether his firm, Inter-

national Industries, has or ever had a liquor importer's license. (Tr. 231.)

7. The Court erred in sustaining the objection of the plaintiff to the direct examination of the defendant, Frank San Roman, when he was asked to state his conversation with Gabriel Todes relative to the extent and scope of the latter's authority to represent the defendants. (Tr. 232.)

8. The Court erred in sustaining the objection of the plaintiff during the direct examination of the defendant, Frank San Roman, when he was asked to state whether the regulations and practices of people in Mexico in connection with letters of credit were any different from those in the United States during the latter part of 1943 and 1944 as to shipments of tequila and other liquors made directly from Mexico to the United States. (Tr. 233-234.)

9. The Court erred in sustaining the objection of the plaintiff to the direct examination of the defendant, Frank San Roman, when he was asked whether the money for the shipment of tequila in question was paid by the plaintiff to the defendants or the extent of the monies that the defendants received from this payment. (Tr. 234.)

10. The Court erred in sustaining the objection of the defendants to the direct examination of the defendant, Frank San Roman, when he was asked whether the
419 letter of credit of the Chase National Bank was ever assigned by the defendants. (Tr. 235.)

11. The Court erred in sustaining the objection of the plaintiff to the offer of proof made by the defendants during the direct examination of Frank San Roman. (Tr. 235, 236, 237, 238.)

12. The Court erred in sustaining the objection of the plaintiff to the introduction of defendants' exhibit 1 for identification, being the original letter of Globe Liquor Company dated April 21, 1944, signed by M. L. Lazarus. (Tr. 238-239.)

13. The Court erred in sustaining the objection of the plaintiff to the introduction of defendants' exhibit 2 for identification, being a letter of Globe Liquor Company dated April 27, 1944, to Pine Needle de Mexico, signed by Mr. Lazarus. (Tr. 240-241.)

14. The Court erred in sustaining the objection of the plaintiff to the introduction of defendants' exhibit 4 for

identification, being a letter of International Industries dated May 10, 1944, addressed to Globe Liquor Company. (Tr. 243-244.)

15. The Court erred in sustaining the objection of the plaintiff to the introduction of defendants' exhibit 5 for identification, being the affidavit of Gonzalo A. Larrea dated April 28, 1944. (Tr. 243, 244, 245.)

16. The Court erred in sustaining the objection of the plaintiff to the introduction of defendants' exhibit 6 for identification, being the original letter of Jovita Perez dated May 27, 1944, addressed to International Industries. (Tr. 246.)

420 17. The Court erred in sustaining the objection of the plaintiff to the introduction of defendants' exhibit 8 for identification, being a declaration of shipper signed Gonzalo A. Larrea, dated May 23, 1944. (Tr. 248, 250.)

18. The Court erred in sustaining the objection of the plaintiff to the introduction of defendants' exhibit 9 for identification, being a notice of Gonzalo A. Larrea to Globe Liquor Company dated May 23, 1944. (Tr. 249-251.)

19. The Court erred in sustaining the objection of the plaintiff to the introduction of defendants' exhibit 10 for identification, being special consular certificate in Mexico dated May 23, 1944, of Gonzalo A. Larrea. (Tr. 249-252.)

20. The Court erred in sustaining the objection of the plaintiff to the introduction of defendants' exhibit 11 for identification, being a telegram dated July 22, 1944, of Gonzalo A. Larrea addressed to Globe Liquor Company. (Tr. 253.)

21. The Court erred in sustaining the objection of the plaintiff to the introduction of defendants' exhibit 12 for identification, being a letter of Gabriel H. Todes to Globe Liquor Company dated July 12, 1944. (Tr. 254.)

22. The Court erred in sustaining the objection of the plaintiff to the introduction of defendants' exhibit 13 for identification, being a letter of Globe Liquor Company to International Industries dated July 24, 1944. (Tr. 255.)

421 23. The Court erred in sustaining the objection of the plaintiff to the introduction of defendants' ex-

hibit 14 for identification, being a letter of Globe Liquor Company dated July 27, 1944, to International Industries. (Tr. 256.)

(i) Relative to the Court's rulings as to the deposition of Gabriel H. Todes, the following is specified by defendants-appellants:

1. The Court erred in sustaining the objection of the plaintiff to the direct examination of Gabriel H. Todes as to the scope and extent of his authority to represent the defendants. (Deposition pages 6, 7, 8, 9, 10, 11; Tr. 197, 199, 200; hereafter, the abbreviation "Dep." will designate the deposition of Gabriel H. Todes.)

2. The Court erred in sustaining the objection of the plaintiff to the direct examination of Todes relating to his conversation with Morton Lazarus on or about March 16, 1944, as to the order for the merchandise in question. (Dep. 15-23; Tr. 197, 199, 200, 203, 204, 205.)

3. The Court erred in sustaining the objection of the plaintiff to the direct examination of Todes as to trade conditions during March of 1944 relating to whether alcoholic beverages were plentiful at the time. (Dep. 24-25; Tr. 208.)

4. The Court erred in sustaining the objection of the plaintiff to the direct examination of Todes relating to his conversation with Morton Lazarus on or about March 16, 1944. (Tr. 208; Dep. 25, 26, 27.)

5. The Court erred in sustaining the objection of the plaintiff to the direct examination of Todes relating to his conversation with Morton Lazarus during July of 1944. (Dep. 28, 29, 30, 31, 32, 33; Tr. 209, 213, 215, 216.)

422 6. The Court erred in sustaining the objection of the plaintiff to the direct examination of Todes relating to a trade custom or practice as to the sale of liquors to buyers in the United States during March of 1944, whereby a broker handling a sale would continue to perform services relative to the sale up to and including the time of the delivery of the merchandise to the buyer. (Dep. 35-36; Tr. 216.)

7. The Court erred in sustaining the objection of the plaintiff to the direct examination of Todes relating to a general trade custom or practice as to when the brokerage commission would be due and payable to the broker. (Dep. 37-38; Tr. 216.)

8. The Court erred in striking the cross-examination of Todes in his deposition relating to the defendants' counsel's question that in the course of Todes conversation with Lazarus, Todes told Lazarus that International Industries was not responsible for the quality of the merchandise. (Dep. 46-47; Tr. 220.)

9. The Court erred in sustaining the objection of the plaintiff to the redirect examination of Todes as to the drop in the buying demand and in the market value of tequila during the months of April, May, June and July of 1944. (Dep. 62-63; Tr. 225.)

10. The Court erred in striking all of plaintiff's cross-examination of the deposition of Todes. (Dep. 46; Tr. 224.)

Nat M. Kahn
Nat M. Kahn
Attorney for Defendants-Appellants.

Received a copy of the foregoing Statement of Points, this 10th day of July, A. D. 1946.

Irving R. Brand for
Ben W. Heineman
Attorney for Plaintiff-Appellee.

And on the same day, to wit, the 11th day of June, 1946 there was filed in the Clerk's office of said Court a certain Bond On Appeal in words and figures following,

422A And on the same day, to wit, the 11th day of June, to wit:

423 Know All Men By These Presents:

That we, Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, as principals, and Hartford Accident & Indemnity Company, a corporation, as surety, are held and firmly bound unto Globe Liquor Company, Inc., a corporation, in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said Globe Liquor Company, Inc., a corporation, its attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally,

firmly by these presents. Sealed with our seals and dated this 10th day of June in the year of our Lord one thousand nine hundred and forty-six.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a suit pending in said Court between Globe Liquor Company, Inc., a corporation, as plaintiff, against Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, as defendants, a judgment was rendered against the defendants on March 15, 1946, for Nine Thousand, Seven Hundred Seventeen Dollars and Sixty-eight Cents ($9,717.68) and costs, and the said defendants having filed in the Clerk's Office of the said District Court Notice of Appeal to the United States Circuit Court of Appeals for the Seventh Circuit, to reverse the judgment of the aforesaid suit, in the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within forty (40) days from the date hereof

Now, the condition of the above obligation is such, that if the said defendants shall pay the costs if the appeal is dismissed or the judgment is affirmed, or pay such costs as the appellate court may award if the judgment is modified then the above obligation to be void; otherwise to remain in full force and virtue.

Frank San Roman (Seal)
Dorothea San Roman (Seal)
Hartford Accident and
Indemnity Company (Seal)
By Sol Salins (Corporate Seal)

Attorney-in-fact

Sealed and delivered in presence of:
Nat M. Kahn
Marie Shay

424 And afterwards, to wit, on the 17th day of June, 1946, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

425 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 45 C 120) * *

AGREED ORDER FOR EXTENSION OF TIME FOR DEFENDANTS-APPELLANTS TO FILE STATEMENT OF POINTS, ETC.

By agreement of the parties, It Is Ordered that the defendants-appellants shall have an extension of time until July 1, 1946, to file their Statement of Points on which they intend to rely on their appeal herein; and

It Is Further Ordered, that the defendants-appellants in said Statement of Points shall be permitted to give page references in the transcript of proceedings as to errors relating to rulings on the evidence.

Enter:

Barnes
Judge

Approved:

B. W. Heineman
Attorney for Plaintiff-Appellee.

Nat M. Kahn
Attorney for Defendants-Appellants

426 And afterwards on, to wit, the 18th day of June 1946 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Notice For and Designation Of Contents Of Record On Appeal in words and figures following, to wit:

427 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 45 C 120) * *

NOTICE.

To: Ben W. Heineman
135 S. La Salle Street
Chicago 3, Illinois
Attorney for Plaintiff-Appellee.

Please Take Notice, that on Tuesday, June 18th, A. D. 1946, I shall filed in the Office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, the defendants-appellants' designation of the contents of the record on appeal. A copy of said designation is attached to this notice and by reference thereto is made a part of this notice.

Nat. M. Kahn
Suite 1757 First Nat'l Bank Bldg.
33 S. Clark Street
Chicago 3, Illinois
Telephone: Central 3053
Attorney for Defendants-Appellants.

Received a copy of the foregoing Notice and Designation of Contents of Record on Appeal attached thereto, this 18th day of June, A. D. 1946.

Ben W. Heineman
Attorney for Plaintiff-Appellee.

428 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 45 C 120) * *

DEFENDANTS-APPELLANTS' DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

To The Clerk of this Court:

You are hereby directed to prepare an authenticated transcript of the record for the appeal in the above entitled cause, which shall contain the following documents and matters:

(1) Plaintiff's complaint filed January 29, 1945.

(2) Stipulation of parties waiving service of notice to produce original documents, filed November 5, 1945.

(3) Order entered January 4, 1946, granting leave to defendants to file amended answer.

(4) Defendants' amended answer, filed January 4, 1946.

(5) Depositions of Gabriel H. Todes, filed January 8, 1946.

(6) Motion of plaintiff to strike depositions of Gabriel H. Todes, filed February 21, 1946.

(7) Two (2) copies of reporter's transcript of trial proceedings, together with all exhibits admitted in
429 evidence and identified and offered in evidence by the parties.

(8) Defendants' motion for a directed verdict and order of denial thereof by trial court, filed March 14, 1946.

(9) Order of court instructing jury to return verdict for plaintiff and verdict of jury, filed March 14, 1946.

(10) Judgment order in favor of plaintiff and against defendants, filed March 14, 1946.

(11) Defendants' motion for new trial and order of court overruling and denying same, filed March 22, 1946.

(12) Defendants' notice of appeal and appeal cost bond, filed June 11, 1946.

(13) Copy of this designation and notice for filing same.

(14) Defendants' statement of points relied on for reversal.

(15) All further orders of court entered subsequent to date hereof relating to appeal.

Nat M. Kahn,
Nat M. Kahn,
Attorney for Defendants-Appellants, Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries.

Dated June 15, 1946.

430 And afterwards, to wit, on the 1st day of July, 1946, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

431 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 45 C 120 • •

AGREED ORDER FOR FURTHER EXTENSION OF TIME UNTIL JULY 10, 1946, FOR DEFENDANTS-APPELLANTS TO FILE STATEMENT OF POINTS.

By agreement of the parties, It Is Ordered that the defendants-appellants shall have a further extension of time until July 10, 1946, to file their Statement of Points on which they intend to rely on their appeal herein.

Enter:
Barnes
Judge

Approved:
B. W. Heineman
Attorney for Plaintiff-Appellee
Nat M. Kahn
Attorney for Defendants-Appellants

432 And afterwards, to wit, on the 15th day of July, 1946, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter J. LaBuy District Judge, appears the following entry, to wit:

433 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 45 C 120) * *

AGREED ORDER FOR INCORPORATING ORIGINAL EXHIBITS IN RECORD ON APPEAL

By agreement of the parties, It Is Ordered that the original exhibits of the parties admitted in evidence and identified and offered in evidence, in lieu of copies thereof, shall be incorporated in the Transcript of the Record in the above appeal.

Enter:
Walter J. LaBuy
Judge

July 15, 1946

Approved:
B. W. Heineman
Attorney for Plaintiff-Appellee
Nat M. Kahn
Attorney for Defendants-Appellants

434 And afterwards, to wit, on the 19th day of July, 1946, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Walter J. LaBuy District Judge, appears the following entry, to wit:

435 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. 45 C 120) • •

ORDER GRANTING SUPERSEDEAS.

On motion of Nat M. Kahn, attorney for the defendants, and upon due notice to the attorney for the plaintiff, and upon presenting to the Court defendants' motion for a supersedeas and petition in support thereof, pending their apppeal to the United States Circuit Court of Appeals for the Seventh Circuit, and it appearing to the Court from said motion and petition that the defendants are entitled to such a stay;

It Is Ordered, that the defendants' individual supersedeas appeal bond in the penal sum of Twelve Thousand Dollars ($12,000.00), filed this day, be and the same is hereby approved; and

It Is Further Ordered, that the execution of any proceedings to enforce the judgment rendered in behalf of the plaintiff and against the defendants in the above entitled cause be stayed, pending the determination of the defendants' appeal from such judgment to the United States Circuit Court of Appeals for the Seventh Circuit.

Enter:

Walter J. LaBuy
Judge

July 19, 1946

436 And on the same day, to wit, the 19th day of July, 1946 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Individual Supersedeas Bond in words and figures following, to wit:

437 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * * (Caption—No. 45 C 120) * * *

DEFENDANTS' INDIVIDUAL SUPERSEDEAS BOND.

Know All Men by these Presents, That we, Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, of Chicago, Cook County, Illinois, are held and firmly bound unto Globe Liquor Company, Inc., a corporation, in the penal sum of Twelve Thousand Dollars ($12,000.00), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, and firmly by these presents.

Witness our hands and seals this 18th day of July, A. D. 1946.

The Condition of the Above Obligation Is Such, That whereas the said Globe Liquor Company, Inc., a corporation, did, in the United States District Court for the Northern District of Illinois, Eastern Division, recover a judgment in its favor against the obligors, Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, on March 15, 1946, for Nine Thousand, Seven Hundred Seventeen Dollars and Sixty-eight Cents ($9,717.68)
438 and costs of suit; and said obligors, having filed in the Clerk's Office of the said United States District Court for the Northern District of Illinois, Eastern Division, their notice of appeal to the United States Circuit Court of Appeals for the Seventh Circuit to reverse the judgment in the aforesaid suit in the United States Circuit Court of Appeals for the Seventh Circuit, to be holden in Chicago, Cook County, Illinois, within forty (40) days from date hereof;

Now, Therefore, the Condition of the Above Obligation Is Such, That if the said Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, shall prosecute their

appeal to effect and satisfy the said judgment in full, together with costs; interest and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest and damages as the United States Circuit Court of Appeals for the Seventh Circuit may adjudge and award, then the above obligation is void, else to remain in full force and effect.

Frank San Roman (Seal)
Dorothea San Roman (Seal)

Walter J. LaBuy,
Judge of the United States District Court for the Northern District of Illinois, Eastern Division.

439 Northern District of Illinois,
Eastern Division—ss.

CLERK'S CERTIFICATE.

I, Roy H. Johnson, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this Court in the cause entitled: Globe Liquor Company, Inc., a Corporation, Plaintiff, v. Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, Defendants, No. 45 C 120, as the same appear from the original records and files thereof now remaining in my custody and control, excepting the original Exhibits which are incorporated herein by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois this 19th day of July, A. D. 1946.

Roy H. Johnson
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record filed on the twenty-eighth day of October, 1946, in:

Cause No. 9146.

Globe Liquor Company, a corporation,
Plaintiff-Appellee,

vs.

Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries,
Defendants-Appellants,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 7th day of May, A. D. 1947.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the second day of October, in the year of our Lord one thousand nine hundred and forty-five, and of our Independence the one hundred and seventieth.

Globe Liquor Company, Inc., a Corporation, *Plaintiff-Appellee,* vs. Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, *Defendants-Appellants.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

9146

And afterwards, to-wit: On the twenty-ninth day of January, 1947, the following proceedings were had and entered of record, to-wit:

Wednesday, January 29, 1947.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.

Globe Liquor Company, Inc., a Corporation, *Plaintiff-Appellee,* vs. Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, *Defendants-Appellants.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

9146

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Nat M. Kahn, counsel for appellant and by Mr. Ben W. Heineman, counsel for appellees, and the Court takes this matter under advisement.

And afterwards, to-wit: On the fourteenth day of February, 1947, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 9146. October Term, 1946; January Session, 1947.

GLOBE LIQUOR COMPANY, INC., A Corporation, *Plaintiff-Appellee,* *vs.* FRANK SAN ROMAN and DOROTHEA SAN ROMAN, Doing Business Under the Firm-Name and Style of International Industries, *Defendants-Appellants.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

February 14, 1947.

Before SPARKS, MAJOR, and MINTON, *Circuit Judges.*

MINTON, *Circuit Judge.* The plaintiff-appellee, a corporation of Delaware, sued the defendants-appellants, a partnership whose members reside in and are citizens of Illinois, for breach of an express warranty. It is alleged in the complaint that the plaintiff agreed to purchase from the defendants and the defendants agreed to sell and deliver to the plaintiff 750 cases of Mexican tequila, described as "Mariachi Tequila Gold, in good merchantable condition, fit for human consumption," and that the defendants failed and refused to deliver the tequila to the plaintiff "in good merchantable condition fit for human consumption in violation of their agreement so to do."

The plaintiff exhibited with its complaint and introduced in evidence an order for the tequila made out on an improvised order blank in the handwriting of the plaintiff's vice president. Some letters and memoranda that had passed between the parties were also exhibited with the complaint

and introduced in evidence. No written definitive contract was entered into between the parties covering the transaction.

The defendants in their amended answer alleged that at the time the order was taken by their salesman, the plaintiff was informed by him that the order was subject to acceptance and confirmation by the shipper in Mexico, and that the defendants were not to be responsible for the quality of the liquor but such responsibility was to be that of the shipper in Mexico.

The case was tried before a jury, and at the conclusion of all the evidence each party made a motion for a directed verdict. The court overruled the defendants' motion and sustained the plaintiff's motion, entering judgment for the plaintiff for the purchase price paid for the tequila, plus certain expenses incurred, including freight from Laredo, Texas. The defendants filed a motion for a new trial which was overruled. From the judgment of the court sustaining the plaintiff's motion for a directed verdict and awarding damages, the defendants have appealed.

As we have pointed out, the plaintiff alleged and relied upon an express warranty by the defendants. There is not one word or syllable in the written exhibits or in the oral testimony that the defendants ever agreed to deliver tequila "in good merchantable condition, fit for human consumption." In this state of total failure to prove an express warranty as alleged in the complaint, the court directed a verdict for the plaintiff. This was error.

Not only was it error to grant the motion of the plaintiff for a directed verdict. It also was error to refuse to grant the motion of the defendants for a directed verdict, because there was a total failure of proof on the question of express warranty, upon which the plaintiff had relied. The court was right in one respect. It was right in directing a verdict, but it directed the verdict for the wrong party. In this situation, we are at liberty to dispose of the case here. *West Virginia Pulp & Paper Co.* v. *Cone*, 153 F. 2d 576, 581, 582; *United States* v. *Halliday*, 116 F. 2d 812, 815, 816; *Berry* v. *United States*, 111 F. 2d 615; *Conway* v. *O'Brien*, 111 F. 2d 611, 613.

The judgment of the District Court is reversed, and the cause is remanded with directions to overrule the motion of the plaintiff for a directed verdict, sustain the motion of the defendants for a directed verdict, and enter judgment for the defendants.

And on the same day, to-wit: On the fourteenth day of February, 1947, the following further proceedings were had and entered of record, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Friday, February 14, 1947.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks.
Hon. J. Earl Major.
Hon. Sherman Minton

Globe Liquor Company, Inc., *Plaintiff-Appellee,* vs. Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, *Defendants-Appellants.*	9146	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, and that this cause be, and the same is hereby, remanded to the said District Court with directions to over-rule the motion of the Plaintiff for a directed verdict, sustain the motion of the Defendants for a directed verdict, and enter judgment for the Defendants.

And afterwards, to-wit: On the First day of March, 1947, there was filed in the office of the Clerk of this Court a Petition of plaintiff-appellee for Rehearing and Memorandum in Support thereof, which said Petition for Rehearing and Memorandum in Support thereof, is in the words and figures following, to-wit:

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 9146

GLOBE LIQUOR COMPANY, INC., a corporation,

Plaintiff-Appellee,

v.

FRANK SAN ROMAN and DOROTHEA SAN ROMAN, doing business under the firm name and style of INTERNATIONAL INDUSTRIES,

Defendants-Appellants.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable John P. Barnes, Judge Presiding.

PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT THEREOF

BEN W. HEINEMAN
JOSEPH D. BLOCK
Attorneys for Plaintiff-Appellee

SWIREN HEINEMAN & ANTONOW
Suite 1406
135 South LaSalle Street
Chicago 3, Illinois
Of Counsel.

LINCOLN PRINTING COMPANY, CHICAGO—WABASH 4004

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 9146

GLOBE LIQUOR COMPANY, INC., a corporation,
Plaintiff-Appellee,
v.
FRANK SAN ROMAN and DOROTHEA SAN ROMAN, doing business under the firm name and style of INTERNATIONAL INDUSTRIES,
Defendants-Appellants.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable John P. Barnes, Judge Presiding.

PETITION FOR REHEARING

To the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now Comes Globe Liquor Company, Inc., the plaintiff-appellee herein, by its duly authorized attorneys, and presents its petition for a rehearing in these proceedings. In support of this petition, the undersigned respectfully show:

I.

Assuming, without conceding, that the Court was correct in determining that the complaint alleged an express warranty, nevertheless the Court should have treated the complaint as amended pursuant to Rule 15(b) of the Federal Rules of Civil Procedure and should have affirmed the judgment below since the record evidence discloses the existence of an implied warranty under Section 15(2) of the Illinois Uniform Sales Act (Ill. Rev. Stats. c. 121½, §15(2)) and its breach by the defendants.

II.

In determining that the complaint alleged an express warranty and thereupon directing judgment to be entered for defendants, the Court placed an unduly harsh and technical construction upon the complaint contrary to the words and spirit of Rule 8(f) of the Federal Rules of Civil Procedure. The specific allegations of the complaint are consistent with the allegation of a warranty implied by law as a part of the alleged agreement by the defendants to sell and deliver the tequila, the only omission being the allegation of the particular section of the Illinois statutes creating the warranty.

A memorandum in support of this petition is annexed hereto.

WHEREFORE, for the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted and that upon such further consideration the judgment below be affirmed.

Respectfully submitted,

s/ BEN W. HEINEMAN,
s/ JOSEPH D. BLOCK,
Attorneys for the Plaintiff-Appellee.

CERTIFICATE

The undersigned, Ben W. Heineman, does hereby certify that he is one of the attorneys for the plaintiff-appellee herein; that he has read and is familiar with the within and foregoing petition for rehearing and that the same was filed in good faith and not for purposes of delay.

s/ BEN W. HEINEMAN
Ben W. Heineman

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 9146

GLOBE LIQUOR COMPANY, INC., a corporation,
Plaintiff-Appellee,
v.
FRANK SAN ROMAN and DOROTHEA SAN ROMAN, doing business under the firm name and style of INTERNATIONAL INDUSTRIES,
Defendants-Appellants.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable John P. Barnes, Judge Presiding.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

I.

Rule 15(b) of the Federal Rules of Civil Procedure requires that the complaint be treated as amended to conform to the evidence.

As will appear hereafter, the record evidence discloses that, pursuant to Section 15(2) of the Illinois Uniform Sales Act, the defendant sellers impliedly warranted the tequila as being of merchantable quality and the breach of that implied warranty by the adulteration of the tequila with particles of glass. Assuming, without conceding, that the Court correctly construed the complaint as alleging an express warranty, nevertheless, in the light of the record evidence and the requirements of Rule 15(b) of the Federal Rules of Civil Procedure, the complaint should be treated as amended to conform to that evidence.

Rule 15(b) provides in part as follows:

"Rule 15. Amended and Supplemental Pleadings.

* * *

"(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues."

The Circuit Courts of Appeals have uniformly construed this Rule as requiring them to treat pleadings as amended to reflect claims or defenses shown by the record evidence to exist, even though such claims or defenses were not pleaded or determined below.

The recent decision of *Wall v. Brim*, 138 F. (2d) 478, 481 (C.C.A. 5th, 1943) is closely in point. In that case an action was brought for malpractice. The defendant physician was charged with failing to bring to the exercise of his profession the reasonable degree of care and skill required by law. There was a general denial and the issues so made were submitted to the jury. A verdict was returned in favor of the plaintiff and judgment entered thereon. Upon appeal, the Circuit Court of Appeals, speaking through Judge Hutcheson, concluded that there was no evidence to support the allegation of malpractice and that, accordingly, "if the record presented no other issues as to defendant's breach of his obligation as a physician" the Court would have felt compelled "to order a reversal with directions to enter judgment for defendant notwithstanding the verdict." (at 481)

This the Court refused to do, however, since it found that the record disclosed the basis for a further claim which was neither pleaded nor submitted to the jury. The Court said:

> "But though not specifically presented by the pleadings and apparently not submitted to the jury, the record, in the light of Rule 15(b), authorizing the amendment of pleadings to conform to the evidence definitely presented another issue which should have been developed before, and submitted to, the jury. This was whether the defendant did not breach the obligation which as a surgeon he owed plaintiff when, after making the incision and ascertaining that the operation would be not the absolutely simple one he had secured plaintiff's consent to perform, but a serious and difficult one fraught with possible, if not probable dangers, he went ahead without making full disclosure of the difficulties attending, and the possible dangers of, the operation and securing her consent to go forward under the new found conditions."
>
> • • • • •
>
> "In the light of these principles, and of the undisputed evidence in the case, it cannot be said that a verdict for defendant is demanded or that, reversing the cause, we should direct a judgment notwithstanding the verdict. Neither can it be said that the judgment should be affirmed. For the issue, as to whether the defendant in proceeding with the operation as he did after discovering its true character, without advising plaintiff of its nature and securing her consent to it, committed a trespass upon her or a breach of his obligation to exercise the care and skill required of him, was not developed and tried out as it should have been. The judgment must, therefore, be reversed, and the cause remanded for trial anew with full right to the parties to amend their pleadings and to offer new and additional evidence as they are advised." (at 481) (footnotes omitted)

Upon retrial upon this issue, the jury again returned a verdict for the plaintiff. Upon a second appeal the defendant argued that a new cause of action was introduced by the amendment to the pleadings more than two years after it arose. The Court, again speaking through Judge Hutcheson, rejected this argument, saying:

> "On his second and most argued point, that a new cause of action was introduced by the amendment more than two years after it arose, appellant stands no better. As was pointed out in the reversing opinion on the former appeal, the evidence on that trial definitely presented this ground for recovery and, under Federal Rules of Civil Procedure, rule 15(b), 28 U.S.C.A. following section 723c, it could then have been submitted to the jury if requested, though no formal amendment had been made. Under these circumstances, it would be a sticking in the bark of pure technicality to say that when the pleadings were later formally amended to conform to the evidence, the claim was then first presented." *Wall* v. *Brim*, 145 F. (2d) 492, 493 (C.C.A. 5th, 1944) (cert. den. 324 U.S. 857).

To the same effect are *Venuto* v. *Robinson*, 118 F. (2d) 679, 683 (C.C.A. 3rd, 1941); *Cabel v. United States*, 113 F. (2d) 998, 1000 (C.C.A. 1st, 1940); *American Fork & Hoe Co.* v. *Stampit Corporation*, 125 F. (2d) 472, 474 (C.C.A. 6th, 1942); *Lientz* v. *Wheeler*, 113 F. (2d) 767, 769 (C.C.A. 8th, 1940).

The record evidence in this case discloses undisputed facts entitling the plaintiff to recover upon the basis of an implied warranty of merchantable quality by the defendant sellers.

This implied warranty is established as a matter of law by Section 15(2) of the Illinois Uniform Sales Act which provides as follows:

"§15. Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

• • •

"(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality." (Ill. Rev. Stats. c. 121½ §15).

The record evidence discloses without contradiction both that the sale of the tequila was by description and that the defendants dealt in goods of that description.

As was pointed out in our supplemental memorandum, evidence introduced by the defendants themselves unmistakably establishes that they were in fact dealers in tequila. Upon examination by defendants' counsel, their salesman, Gabriel H. Todes, testified as follows:

"Q. Did you make an arrangement with him to act as a salesman for his firm? A. Yes, I got in touch with Mr. Roman and wrote him a letter asking him if he had any connection whatsoever where he could get merchandise from Mexico to sell in the United States.

"Q. Do you recall when that was? A. It was in the very early part of 1944. I called him on the 'phone first and then I wrote him a letter.

"Q. When did you first start selling merchandise as a salesman for International Industries? A. In January, 1944.

"Q. You made some sales, did you? A. *I made quite a number of sales.*

"Q. What commodity did you sell? A. I sold Tequila.

"Q. Mexican Tequila? A. Mexican Tequila.

"Q. What other commodity? A. Gin. That came from Argentine, and some of it came from Mexico. *I sold thousands of cases of the Tequila.*" (Tr. 20-21; admitted into evidence Tr. 144, 177) (Italics supplied)

It is equally clear that the plaintiff bought the tequila by "description" within the meaning of Section 15(2) of the Illinois Uniform Sales Act. There is no claim that it was bought either by inspection or sample. Counsel for the defendants, however, contends that the tequila was bought under a trade name, apparently assuming that a purchase under a trade name precludes the purchase from being one by description within the meaning of Section 15(2). It is a fundamental rule of the law of sales that a purchase by description within the meaning of Section 15(2) includes a purchase under a trade name. A description of the commodity by its trade name complies fully with the requirements of Section 15(2).

An outstanding example is the leading case of *Ryan* v. *Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105 (1931) where the New York Court of Appeals, speaking through Cardozo, C. J., held the implied warranty of Section 15(2) to apply to a purchase of "Ward's Bread". The decision is noteworthy for its careful consideration of the problem presented.

There are literally scores of decisions under the Uniform Sales Acts in the various states applying the implied warranty created by Section 15(2) to purchases by trade name. Annotation, 135 A.L.R. 1393 (1941); 55 Corpus Juris (Sales) §724, p. 759. This, of course, is possible only if a purchase under a trade name constitutes a purchase by description within the meaning of that subsection.

Defendants' counsel also argues, however, that if the purchase is one under a trade name, then Section 15(4) of the Uniform Sales Act prohibits the raising of an implied warranty under Section 15(2). Counsel's argument is too broad and is contrary to the settled construction of those statutory provisions. Section 15(4) provides that in the case of a sale of a specified article under its patent or other trade name, there is "no implied warranty as to its fitness for any particular purpose." This refers specifically and solely to the implied warranty of fitness for a particular purpose established by Section 15(1) of the Uniform Sales Act and does not affect the implied warranty of merchantable quality established by Section 15(2). Here, again, the construction of these provisions of the Uniform Sales Act is settled and uniform.

As was said in *Giant Mfg. Co. v. Yates-American Mach. Co.*, 111 F. (2d) 360, 365 (C.C.A. 8th, 1940):

> "Paragraphs '2' and '4' of the section are the ones involved here. Plaintiff relies on paragraph '4', insisting that these sales were of 'a specified article under its * * * trade name' and, therefore, there could be no implied warranty 'as to its fitness for any particular purpose.' Defendant relies on paragraph '2', insisting that 'where the goods are bought by description from a seller who deals in goods of that description; * * * there is an implied warranty that the goods shall be of merchantable quality' and that these coils were not of merchantable quality.
>
> "To determine this controversy, it is unnecessary to examine at length the meanings of these two paragraphs of the section. It is enough here to say that paragraph '2' authorized an implied warranty of merchantable quality and that paragraph '4' does not proscribe such a warranty. In this regard, there is no conflict nor essential difference between the

paragraphs. One meaning of merchantable quality is that the article sold shall be reasonably suitable for the ordinary uses it was manufactured to meet. [Citing numerous decisions] 'Particular purpose', as used in paragraph '4' means a usage other, or different (in kind or extent), than the ordinary uses the article was made to meet."

In *D'Onofrio* v. *First National Stores, Inc.* 26 A.(2d) 758 (R. I. 1942) canned corn was purchased under its trade name of "Finast". The purchaser was injured while eating the canned corn due to the presence of metal wire. There the Court said:

"The defendant also contends that the direction of a verdict in its favor was proper because the evidence showed a situation which brought the plaintiff's case under the provisions of §15(4) and, therefore, the defendant was not held to any implied warranty that the canned corn it sold the plaintiff was fit for any particular purpose, even though the defendant impliedly knew that said corn was for human consumption. In our opinion the above contention is not sound.

* * *

"On the other hand, it has been held that in the purchase of foodstuffs for human consumption, under circumstances similar to those appearing in evidence in the present case, the provisions of §15(2) respecting the existence of an implied warranty of merchantability apply, and that the provisions of §15(4) do not preclude a finding, under said §15(2), of a warranty of merchantability and of a breach thereof. *Ryan* v. *Progressive Grocery Stores, Inc.* 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339; *Botti* v. *Venice Grocery Co.*, 309 Mass. 450, 35 N.E. 2d 491, 135 A.L.R. 1387. In the last-named case, at page 456 of 309 Mass., at page 494 of 35 N.E. 2d the court uses the following language: '* * * we think the mere fact that an article sold happens to have a trade name does not, in and of itself, bring the sale under clause

(4), but if it does, that the warranty contained in clause (2) is not excluded. * * * Fitness for consumption of food well may be equivalent to fitness for the particular purpose for which food may be bought, but it is also equivalent to fitness for the general purpose for which food is usually sold to the consumer.'

"We are of the opinion that, in view of the facts and circumstances appearing in evidence, the two cases just cited set out the principles of law which apply to and govern the instant case. In our judgment such principles appear to be particularly applicable in the ordinary case where the sale of foodstuffs for human consumption is involved." (at page 760)

See also *Botti* v. *Venice Grocery Co.*, 35 N.E. (2d) 491 (Mass. 1941); *Sperry Flour Co.* v. *DeMoss*, 18 P. (2d) 242 (Ore. 1933); *Kelvinator Sales Corp.* v. *Quabbin Improvement Co., Inc.* 254 N.Y.S. 123, 125 (App. Div. 1931); *Dow Drug Co.* v. *Nieman*, 13 N.E. (2d) 130 (Ohio App. 1936).

The defendants rely upon two Illinois cases, *Beckett* v. *The F. W. Woolworth Co.*, 376 Ill. 470 (1941), and *Santa Rosa-Vallejo Tanning Co.* v. *Kronauer & Company*, 228 Ill. App. 236 (1923) as showing that in Illinois at least, a purchase under a trade name negatives the warranty of merchantable quality implied by Section 15(2). The *Beckett* case involved only an alleged express warranty which the Court found did not exist. The Court also concluded that it was a sale by trade name, and hence, that Section 15(4) applied, but did not indicate whether that fact precluded the application of Section 15(2). The question was apparently neither raised nor argued by the plaintiff.

The *Santa Rosa-Vallejo* case, decided in 1923, is occasionally cited as being an authority contrary to the settled construction of the Uniform Sales Act to the effect that

a sale under a trade name is a sale by description within the meaning of Section 15(2) and that the prohibition of Section 15(4) has no application to Section 15(2). See *e.g.* Annotation, 135 A.L.R. 1393 (1941).

That case is clearly distinguishable, however. In the first place, the Court made clear that the only warranty involved was that of fitness for a special purpose; hence, whatever it said with respect to the effect of Section 15(4) upon the implied warranty created by Section 15(2) is *dictum* and in no way controlling upon this Court. The decision clearly should not be regarded as applying Section 15(4) to Section 15(2) in view of the issues presented for decision, and in view of the settled construction to the contrary by the courts of all of the states that have considered the question. See Annotation, 135 A.L.R. 1393 (1941) and decisions cited *supra*.

Even if the *Santa Rosa-Vallejo* case be regarded as passing upon this question, however, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), does not require that it be followed by this Court. Under the then prevailing Illinois statute, decisions of the Illinois Appellate Court had no "binding authority in any cause or proceeding, other than in that in which they may be filed." Smith-Hurd Ill. Ann. Stats. c. 37 §41 (1935).[1]

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[1] The full provision was as follows:

"§41. Opinions—Binding effect

All opinions or decisions of said court upon the final hearing of any cause, shall be reduced to writing by the court, briefly giving therein the reasons for such opinion or decision, and be filed in the case in which rendered: Provided, That such opinions shall not be of binding authority in any cause or proceeding, other than in that in which they may be filed. [1877, June 2, Laws 1877, p. 69, § 17; 1885, June 27, Laws 1885, p. 65, § 1.]"

In 1935, this provision was amended by the omission of the proviso. Illinois Session Laws 1935, p. 696, § 1.

The Supreme Court of the United States has had occasion to consider under circumstances comparable to those presented here, the effect to be given under that statute to a decision of the Illinois Appellate Court. In *Graham v. White-Phillips Co., Inc.*, 296 U.S. 27 (1935), the Supreme Court was faced with the necessity of intepreting the Illinois Negotiable Instruments Law. Although the decision was prior to that in the *Erie* case, the Court pointed out that local law with respect to the interpretation of the Negotiable Instruments Law was required to be followed by the federal courts (at p. 30). The petitioner in that case relied strongly upon a decision of the Illinois Appellate Court. The Supreme Court of the United States refused to follow that decision and held that this Circuit Court of Appeals was entitled to determine for itself the meaning of the contested provision of the Negotiable Instruments Law. The Supreme Court said:

> "The Appellate Courts in Illinois are inferior tribunals and a statute provided that their opinions 'shall not be binding authority in any case or proceeding other than that in which they may be filed.' Illinois Constitution, 1870; Article VI, §11; Cahill's Illinois Rev. Stats. 1933, c. 37, par. 49.
>
> "No authoritative construction of the negotiable instrument law of Illinois supports petitioner's position. And the court below rightly undertook to determine for itself the meaning and effect of the pertinent sections." (at 31)

In our view, it is therefore clear that there is no settled construction in Illinois as to whether Section 15(4) of the Illinois Uniform Sales Act precludes the application of Section 15(2) of that Act. This Court is therefore free to determine for itself the correct meaning of those provisions of the Illinois Uniform Sales Act and should

apply the uniform and settled construction that a purchase under a trade name is a purchase by description within the meaning of Section 15(2) and that Section 15(4) prohibits only the operation of Section 15(1) of the Illinois Uniform Sales Act.

The record evidence disclosing without controversy that the defendants through their salesman, Todes, sold thousands of cases of this tequila, and that it was a sale by description within the meaning of Section 15(2) of the Illinois Uniform Sales Act, a warranty of merchantable quality was raised by implication. This warranty the record also shows to have been breached (Pl. Ex. 10, Tr. 187).

Defendants contend that the implied warranty in this case was effectively disclaimed by their salesman at the time that the plaintiff's order was taken. They rely upon a statement allegedly made by Todes to the plaintiff's Vice-President that the defendants "are not responsible for any shipments or the quality of the merchandise or anything about it." (Tr. 26). This testimony was excluded. This contention of the defendants ignores the requirements of Section 71 of the Illinois Uniform Sales Act which provides as follows:

> "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by *express agreement* or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or to the sale." Ill. Rev. Stats. c. 121½ §71. (italics supplied)

Testimony offered by the defendants themselves clearly shows the absence of any such express agreement between the parties negativing the implied warranty. The defendants' salesman upon redirect examination by defendants' counsel testified as follows:

"Q. During this March 16th, 1944 conversation with Mr. Lazarus, when you told him the International Industries would not be responsible for the shipment of the merchandise or the quality of the merchandise, what, if anything did he say? A. Nothing.

"Q. He didn't object to that statement on your part? A. No.

"Q. He had no comment? A. I understand—

"Q. You can not give us your understanding. You can only state what you heard and what was said. A. All right.

"Q. Was there any comment about it at all? A. No comment." (Tr. 48)

This testimony clearly demonstrates that even if the statement had been admitted into evidence, the express agreement required by law would not have been established. Hence its exclusion does not constitute prejudicial error.

The facts giving rise to the implied warranty are undisputed in the record and, indeed, a substantial portion of such facts were established by the defendants themselves. Moreover, despite the fact that the plaintiff made no effort to introduce any evidence in support of an express warranty, the defendants at no time during the course of the trial complained of or mentioned the absence of such proof. Thus the conclusion is compelled that the issue of the existence of an implied warranty was tried with the implied consent of the defendants within the meaning of Rule 15(b). *Wall* v. *Brim*, 138 F. (2d) 478, 481 (C.C.A. 5th, 1943) (discussed *supra* pp. 4-6). Under Rule 15(b) of the Federal Rules of Civil Procedure, therefore, the complaint should be treated as amended to allege plaintiff's claim of an implied warranty and its breach, and the judgment below should be affirmed.

II.

The construction placed upon the complaint is unduly harsh and technical and violative of the language and spirit of Rule 8(f) of the Federal Rules of Civil Procedure.

The Court construed the complaint as alleging an express warranty. In its opinion the Court said that the "plaintiff alleged and relied upon an express warranty by the defendants."

There is not the least evidence of the reliance by the plaintiff upon an express warranty, and such was never the plaintiff's intention. The plaintiff neither offered nor made any effort to introduce evidence of an express warranty. The plaintiff concedes, and would have conceded at all times, that no express warranty existed.

The allegations of the complaint could be consistently construed as asserting the existence of an implied warranty. The allegation is that there was an agreement to sell and deliver the tequila in good merchantable condition, fit for human consumption. The warranty implied by law is a part of any such agreement of sale and delivery.

Moreover, the defendants always assumed below that a warranty (necessarily implied) was established by the proof.

1. Although the defendants moved for a directed verdict at the close of the plaintiff's evidence, that motion was predicated solely upon agency grounds (Tr. 116-120).

2. Although defendants moved for an instructed verdict at the conclusion of all of the evidence, that motion proceeded exclusively upon the grounds of agency and that the extent of the adulteration "did not justify the plaintiff in rejecting the entire shipment." (Tr. 202).

3. In defendants' motion for a new trial, they nowhere alleged the failure to establish an express warranty or an implied warranty as the basis for the new trial (Tr. 204-206).

The construction placed upon the complaint by this Court is a harsh and technical one, violating the provisions of Rule 8(f) of the Federal Rules of Civil Procedure requiring all pleadings to be "so construed as to do substantial justice."

CONCLUSION

For the reasons heretofore assigned, a rehearing should be granted, and upon further consideration the judgment of the Court below should be affirmed.

Respectfully submitted,

BEN W. HEINEMAN,
JOSEPH D. BLOCK,
Attorneys for the Plaintiff-Appellee.

SWIREN HEINEMAN & ANTONOW,
135 South LaSalle Street,
Chicago 3, Illinois,
Of Counsel.

And afterwards, to-wit: On the Seventh day of March, 1947 there was filed in the office of the Clerk of this Court a Motion for Leave to file Memorandum of Additional Authorities in Support of Petition for Rehearing, which said Motion for Leave to File Memorandum of Additional Authorities in support of Petition for Rehearing, is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Globe Liquor Company, Inc., a Corporation, *Plaintiff-Appellee,* vs. Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, *Defendants-Appellants.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

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MOTION FOR LEAVE TO FILE MEMORANDUM OF ADDITIONAL AUTHORITIES IN SUPPORT OF PETITION FOR REHEARING.

Now come Globe Liquor Co., Inc., plaintiff-appellee herein, by its duly authorized attorneys, Ben W. Heineman and Joseph D. Block, and respectfully moves this Honorable Court for leave to file herein the attached memorandum of additional authorities bringing to the attention of this Court a decision of the Supreme Court of the United States just rendered on March 3, 1947, entitled *Cone* v. *West Virginia Pulp and Paper Co.*, No. 184, reversing the decision of the Fourth Circuit Court of Appeals in *West Virginia Pulp and Paper Co.* v. *Cone*, 153 F. (2d) 576, and overruling the decisions in *United States* v. *Halliday*, 116 F. (2d) 812 (C. C. A. 4th, 1941), Revd. on other grounds, 315 U. S. 94 (1942), *Berry* v. *United States*, 111 F. (2d) 615 (C. C. A. 2nd, 1940), Revd. on other grounds, 312 U. S. 450 (1941), and *Conway* v. *O'Brien*, 111 F. (2d) 611 (C. C. A. 2nd, 1940), Revd. on other grounds, 312 U. S. 492 (1941).

In these proceedings this Court relied upon such decisions so reversed or overruled to support its authority to direct the trial Court to instruct a verdict for the defendants and enter judgment thereon.

Respectfully submitted,

/s/ Ben W. Heineman,
/s/ Joseph D. Block,
Attorneys for Plaintiff-Appellee.

And afterwards, to-wit: On the eighth day of March, 1947, the following further proceedings were had and entered of Record, to-wit:

Saturday, March 8, 1947.

Court met pursuant to adjournment.

Before:

Hon. William C. Sparks, Circuit Judge.

Globe Liquor Company, Inc., a Corporation, *Plaintiff-Appellee,* vs. Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, *Defendants-Appellants.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
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On motion of Counsel for plaintiff-appellee, it is ordered that leave be granted to said counsel to file a memorandum of additional authorities in support of the petition for Rehearing.

And afterwards, to-wit: On the fourteenth day of April, 1947 there was filed in the office of the Clerk of this Court, the Opinion of the Court on the Petition for Rehearing, which said Opinion on the Petition for Rehearing is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 9146. October Term, 1946, April Session, 1947.

GLOBE LIQUOR COMPANY, INC., A Corporation, *Plaintiff-Appellee, vs.* FRANK SAN ROMAN and DOROTHEA SAN ROMAN, Doing Business Under the Firm Name and Style of International Industries, *Defendants-Appellants.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

April 14, 1947.

ON PETITION FOR REHEARING.

Before SPARKS, MAJOR, and MINTON, *Circuit Judges.*

MINTON, *Circuit Judge.* The plaintiff-appellee has filed a petition for rehearing in which it states that even if there was a failure to prove an express warranty as alleged in the complaint, the goods were sold by description and therefore an implied warranty arose, and that we should have considered the pleadings amended to conform to the proof of an implied warranty. No such view was taken in the briefs or in the argument. After the argument the plaintiff filed what it termed a supplemental memorandum in which it seemed to take this position for the first time. Of course, where on the trial evidence is admitted without

objection which proves a case different from that alleged in the complaint, we may consider the pleadings amended to conform to the evidence thus introduced. Federal Rules of Civil Procedure, Rule 15(b).

The Uniform Sales Act of Illinois, which the parties agree shall control, provides that no implied warranty shall arise except: "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality." Ill. Rev. Stat., Chap. 121½, Sec. 15(2) (1945). The evidence shows that the goods were sold by description, but the plaintiff had the burden also to show that the goods were bought from a seller who deals in goods of that description. There was no evidence in the record of any such dealings by the defendants. Realizing the necessity for such evidence, counsel for the plaintiff cited us the testimony by deposition of the defendants' salesman who had sold the goods. This evidence was first cited in the so-called supplemental memorandum after the argument. The trouble with this evidence is that it is not in the record and was kept out on the objection of the plaintiff. No part of the deposition was ever read or considered as read in evidence. No part of the deposition was ever admitted. There was some colloquy in the judge's chambers about the deposition, but nothing was ever done in open court about it. The plaintiff makes the extraordinary suggestion to us that we consider the pleadings amended so as to declare on an implied warranty to conform to the evidence contained in a deposition excluded from the evidence on the objection of the plaintiff. The plaintiff will not be heard to claim the benefit of that evidence which it had had excluded. The plaintiff cannot be allowed to blow hot and cold after such a fashion. So there is in this record no evidence to support an implied warranty. There is a complete failure of proof either of an express or an implied warranty.

Neither can it be contended that the sale was not executed by delivery of the goods conditionally to the plaintiff. The plaintiff agreed to a conditional delivery and to accept such conditional delivery by agreeing to the shipment of the goods C. I. F. Laredo, Texas, on a bill of lading made to the order of the shipper, Gonzalo A. Larrea, and endorsed by the shipper in blank, and the goods to be shipped

in bond subject to the right of the United States Customs Officers to inspect and accept or refuse admission of the goods to this country. When the plaintiff, with the letter of credit which it had authorized, took up the bill of lading under such circumstances, the sale was executed, and the title to the goods passed to the plaintiff. In any view of this case the court erred in sustaining the motion of the plaintiff for a directed verdict and also erred in overruling the motion of the defendants for a directed verdict.

The action of the court was one of law only, and for that reason we disposed of the case here. When we did so, we relied in part upon *West Virginia Pulp & Paper Co.* v. *Cone*, 153 F. 2d 576, 581, 582. Thereafter, the Supreme Court reversed the *Cone* case. (March 3, 1947.) In the *Cone* case, a motion for a directed verdict was made by the defendant and overruled, and the case was submitted to the jury which returned a verdict for the plaintiff. No motion for judgment notwithstanding the verdict was made by the defendant. On certiorari confined solely to whether the Circuit Court of Appeals could dispose of the case on appeal by directing the District Court to sustain the defendant's motion for a directed verdict where a motion for judgment notwithstanding the verdict had not been made, the Supreme Court held that the Circuit Court of Appeals could not so dispose of the case; that Rule 50(b) of the Federal Rules of Civil Procedure required such a motion. The Supreme Court did not hold that if such a motion had been made and overruled, the Circuit Court of Appeals could not have directed, if warranted in law, the District Court to sustain the motion of the defendant for a directed verdict. Nor did the Supreme Court hold that a Circuit Court of Appeals may never dispose of a case where only errors of law are involved. Rule 50(b) was adopted for the purpose of reserving automatically to the District Court the right to pass on a motion for judgment notwithstanding the verdict, even though it had denied a motion for a directed verdict and had submitted the case to the jury. *Ryan Distributing Corporation* v. *Caley*, 147 F. 2d 138, 142. Before this rule was adopted the case of *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636, had required the court to expressly reserve that right. To avoid the *Redman* case, Rule 50(b) was adopted.

Rule 50(b), in our opinion, applies only to cases where

the matter is submitted to a jury for its independent voluntary consideration and verdict. Where the court directs a verdict for the plaintiff, as in the instant case, the matter is not submitted to the jury for it to exercise its independent judgment on the facts. The court has exercised its judgment on a matter of law. Where the court, as in the instant case, has sustained the motion of the plaintiff for a directed verdict, the legal consequence is the same as if the District Court had submitted the case to the jury, the jury had returned a verdict for the plaintiff, and the District Court had overruled the motion of the defendants for judgment notwithstanding the verdict.

We do not think the Supreme Court's action in the *Cone* case should cause us to disturb our ruling, and for the other reasons herein set forth, the petition for rehearing is denied.

And on the same day, to-wit: On the fourteenth day of April, 1947 the following further proceedings were had, and entered of record, to-wit:

Monday, April 14, 1947.

Court met pursuant to adjournment.

Before:

Hon. William C. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.

Globe Liquor Company, Inc., a corporation, *Plaintiff-Appellee,* *vs.* Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, *Defendants-Appellants.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

And afterwards, to-wit: On the sixteenth day of April, 1947 there was filed in the office of the Clerk of this Court a Motion of plaintiff-appellee for Leave to File Second Petition for Rehearing, which said motion for Leave to File Second Petition for Rehearing, is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 9146.

Globe Liquor Company, Inc., a Corporation, *Plaintiff-Appellee,* *vs.* Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, *Defendants-Appellants.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable John P. Barnes, Judge Presiding.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING.

To the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now Comes Globe Liquor Company, Inc., the plaintiff-appellee herein, by its duly authorized attorneys, and respectfully moves for leave to file the annexed second petition for rehearing in the above-entitled proceedings to show that the Court rested its decision on rehearing upon an inadvertent misreading of the record and thereby committed material error.

Respectfully submitted,

Ben W. Heineman,
Joseph D. Block,
Attorneys for Plaintiff-Appellee.

And afterwards, to-wit: On the seventeenth day of April, 1947, there was filed in the office of the Clerk of this Court a motion of defendants-appellants relative to plaintiff-appellee's second petition for rehearing and motion of defendants-appellants for modification of certain language in the opinion, and suggestions of defendants-appellants in support of foregoing motion, which said motions and suggestions are in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 9146.

Globe Liquor Company, Inc., a Corporation, *Plaintiff-Appellee,* *vs.* Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, *Defendants-Appellants.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable John P. Barnes, Judge Presiding.

MOTION OF DEFENDANTS-APPELLANTS RELATIVE TO PLAINTIFF-APPELLEE'S SECOND PETITION FOR REHEARING AND MOTION OF DEFENDANTS-APPELLANTS FOR MODIFICATION OF CERTAIN LANGUAGE IN OPINION.

Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, defendants-appellants, by Nat M. Kahn, their attorney, hereby move for the entry of an order by this Court granting to them leave to file instanter their suggestions for modification of certain language in the opinion on plaintiff-appellee's petition for rehearing, and defendants-appellants further move that this motion shall stand as their answer to the plaintiff-appellee's second petition for rehearing, and in support of this motion the undersigned hereby submit the following suggestions.

Nat M. Kahn,
Attorney for Defendants-Appellants.

SUGGESTIONS OF DEFENDANTS-APPELLANTS IN SUPPORT OF FOREGOING MOTION.

May it please the Court:

We believe we can be of some assistance to Your Honors by pointing out that the second petition for rehearing which the plaintiff-appellee requests to file with this Court is based on its misapprehension of the record of the proceedings in the trial court.

Upon a reading of the printed transcript of the record, commencing at page 144, it will be seen that the first portion of the deposition of Todes that was considered by the trial court started at original typewritten page 6 of the deposition, which appears at page 21 of the printed transcript and commences with Mr. Heineman's question, "What were his oral instructions to you relative to the taking of orders or selling of merchandise in his behalf?" (Tr. 144.) The previous pages of the deposition were not called to the attention of the trial court, nor read to or considered by the trial court. These previous pages, although contained in the printed transcript of the record, contain the testimony of Todes which the plaintiff-appellee characterizes at page 3 of its second petition for rehearing as "Testimony Relating to Dealership." This supposed testimony was never introduced in evidence or even passed on by the trial court.

As to the pages of the deposition that were read by the trial court and considered by it, the trial court rejected practically the entire deposition of Todes, with one single important exception, and a few unimportant details. This one exception was a significant one and refers to the ruling by the trial court permitting Todes to testify to an admission of Lazarus. At pages 153 and 154 of the printed transcript, this particular admission and the ruling of the court shows that it was considered by the court and received in evidence. Here are the rulings of the court relative to this one important fragment of the Todes deposition that was introduced and received in evidence by the trial court:

> "By the Court: If you want that statement,
>
> 'We want our money back'—by Lazarus, you can have it. * * *
>
> "By the Court: You can put in that Mr. Lazarus said to Mr. Todes,
>
> 'We want our money back! * * *'" (Tr. 153.)

"By the Court: Just a minute. You may have that answer at the top of page 30:

'A. He said, "I agree that the shipper is responsible for it." He said, "We want our money back." He said, "I am not saying that it is your fault but it is the shipper's fault." ' • • •" (Tr. 154.)

Practically the entire remainder of the Todes deposition was excluded by the trial court. Consequently, with the exception of this one admission of Lazarus contained in the Todes deposition and several other insignificant bits from the deposition that the trial court received, Your Honors were substantially correct when you stated at page 2 of your opinion on the petition for rehearing that: "No part of the deposition was ever read or considered as read in evidence. No part of the deposition was ever admitted."

The entire deposition as originally filed was incorporated as a part of the record in the trial court. Therefore, the gratuitous concession of counsel for the plaintiff-appellee which it quotes at length at page 4 of its petition for rehearing added nothing to the proof of the deposition offered by the defendants (Tr. 177-178).

It is easy to understand why there has been so much confusion about this Todes deposition. Judge Barnes, the trial court, changed his mind several times about some of the rulings as he went along and finally ended the consideration of the deposition by rejecting practically all of it that was offered, with the exceptions just described.

At page 2 of the opinion of the court on the petition for rehearing, Your Honors stated that: "The evidence shows that the goods were sold by *description* • • •" (Italics ours.) May we respectfully point out to the court that we do not believe that the transaction was a sale by description. Plaintiff's Exhibit 1, being the original order, specified "Mariachi Gold." Lazarus testified that the Gold referred to the gold or yellow color that he preferred (Tr. 98). Plaintiff's Exhibits 2 and 3 referred to "Mariachi Tequila Gold" (Tr. 179). "Mariachi" referred to a trade brand of Tequila. With due deference to Your Honors' opinion and careful consideration of this case, may we suggest that the transaction in question was not a sale by description but a sale of Tequila under a trade or patent name under Section 15(4) of the Uniform Sales Act of Illinois (Ill. Rev. Stats. 1945, Chap. 121½, Par. 15(4), P. 2953).

The language used in the following cases has been construed to refer to sales by description:

"Texas red rust proof seed oats," *Americus Grocery Co.* v. *Brackett*, 119 Ga. 489, 46 S. E. 657;

"Choice sugar-cured canvassed hams," *Forcheimer* v. *Stewart*, 65 Iowa 593, 22 N. W. 886;

"Strictly choice evaporated apples," *Long* v. *J. K. Armsby Co.*, 43 Mo. A. 253;

"Blue vitriol," *Hawkins* v. *Pemberton*, 51 N. Y. 198;

"Madras rice * * * shipped * * * during March and April," *Bowes* v. *Shand*, 2 App. Cas. 455;

"Common hard brick," *Day* v. *Mapes-Reeve Constr. Co.*, 174 Mass. 412, 54 N. E. 878;

"Good, salable corn," *Holloway* v. *Jacoby*, 120 Pa. 583, 15 A. 487;

"Good potatoes," *Northern Supply Co.* v. *Wangard*, 123 Wis. 1, 100 N. W. 1066;

"Strictly fancy, sound, large bunches of grapes," *Kronman* v. *Gardella*, 190 Mich. 645, 157 N. W. 377;

"Pure medicinal cod liver oil," *Leonard* v. *Carleton, etc., Co.*, 230 Mass. 262, 119 N. E. 674;

"Early Ohio seed potatoes," *Hise* v. *Romeo Stores Co.*, 70 Colo. 249, 199 Pac. 483.

We believe that these examples that we have just cited as to sales by description established that the language used by the parties in the instant suit specifying "*Mariachi* Tequila Gold" constituted a sale under a trade or patent name and not a sale by description.

We have heretofore cited to the court *Beckett* v. *F. W. Woolworth Co.*, 376 Ill. 470, wherein the Illinois Supreme Court held that in a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

We have also heretofore cited to this court *Santa Rosa-Vallego Tanning Co.* v. *Kronauer*, 228 Ill. App. 236 and *Negefind* v. *Singer, et al.*, 227 Ill. App. 493, that under Section 15 (4) of the Uniform Sales Act of Illinois where a sale of goods is made under a particular trade name there is an implied warranty to deliver the identical articles sold, *but there is no implied warranty of merchantability.*

The undisputed proof admitted in the record by the trial court established that Globe, through Lazarus, dealt with the defendants and recognized them as being *brokers.* (Tr.

96-97.) The trial court commented on Lazarus' testimony that he said "several times they were acting as broker." (Tr. 106.) Lazarus admitted receiving a telegram from Larrea, the Mexican shipper, whereby the latter agreed to filter and rebottle the merchandise. (Tr. 104.) The contents of the letters of credit proved that Globe insisted on the production of invoices, title and shipping documents directly from the Mexican shipper. Consequently, it must follow conclusively that the defendants were not in the category of "a seller who deals in goods of that description," under Section 15 (2) of the Uniform Sales Act of Illinois. However, regardless of the characterization of the sale, when Lazarus told Todes: "I agree that the shipper is responsible for it. * * * I am not saying it was your fault, but it was the shipper's fault * * *" (Tr. 154), this clearly established the refusal of the defendants to warrant the quality of the goods at the time the initial order was given. Consequently, under Section 71 of the Uniform Sales Act of Illinois (Ill. Rev. Stats. 1945, Chap. 121½, Par. 71, P. 2960), the existence of any implied warranty was expressly negatived.

May we, therefore, respectfully request this court to change the language in its opinion on the petition for rehearing to eliminate that "No part of the deposition was ever read or considered as read in evidence. No part of the deposition was ever admitted," and may we also request the court to change the language in its opinion so that the words "The evidence shows that the goods were sold by description" should be eliminated and a statement made that the evidence showed that the goods were sold under a trade or brand name as "Mariachi Tequila Gold."

Respectfully submitted,

Nat M. Kahn,
Attorney for Defendants-Appellants.

Endorsed: Filed Apr. 17, 1947. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the seventeenth day of April, 1947, the following further proceedings were had and entered of record, to-wit:

Thursday, April 17, 1947.

Court met pursuant to adjournment.

Before:

Hon. Sherman Minton, Circuit Judge.

Globe Liquor Company, Inc., a Corporation, *Plaintiff-Appellee,* *vs.* Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, *Defendants-Appellants.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

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It is ordered that the motion of counsel for the plaintiff-appellee for leave to file a second petition for rehearing herein, be and the same is hereby, denied.

It is further ordered that the motion of counsel for defendants-appellants relative to plaintiff-appellee's second petition for rehearing and for modification of certain language in the opinion of this Court be, and the same is hereby, denied.

And afterwards, to-wit: On the eighteenth day of April, 1947 there was filed in the office of the Clerk of this Court a Motion to Remit Record to Trial Court or, in the Alternative, for Stay of Mandate, which said Motion to remit record to trial court or, in the alternative, for stay of mandate, is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 9146.

Globe Liquor Company, Inc., a Corporation, *Plaintiff-Appellee,* *vs.* Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, *Defendants-Appellants.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable John P. Barnes, Judge Presiding.

MOTION TO REMIT RECORD TO TRIAL COURT, OR IN THE ALTERNATIVE, FOR STAY OF MANDATE.

Now comes Globe Liquor Company, Inc., plaintiff-appellee herein, by its duly authorized attorneys, and respectfully moves as follows:

I.

That this Honorable Court, pursuant to Rule 75(h) of the Federal Rules of Civil Procedure and under the authority of *Beck* v. *Federal Land Bank of Houston*, 146 F. (2d) 623 (C. C. A. 8th, 1945), remit the record in the above-entitled action to the trial court, the District Court of the United States for the Northern District of Illinois, Eastern Division, Honorable John P. Barnes, judge presiding, with the request that the said trial court prepare a statement indicating whether that portion of the testimony by deposition of Gabriel H. Todes relied upon by the plaintiff-appel-

lee in its Petition for Rehearing and which is fully set out in Appendix "A" hereto, was admitted or considered as admitted into evidence by the trial court;

That in connection with the remission of the record, the trial court be furnished with a copy of the Opinion of this court filed on April 14, 1947, plaintiff-appellee's Petition for Rehearing and Memorandum in Support Thereof, defendants-appellants' Answer to Appellee's Petition for Rehearing, the Opinion of this court on Petition for Rehearing filed April 14, 1947, plaintiff-appellee's Second Petition for Rehearing, and the Motion of Defendants-Appellants relative to plaintiff-appellee's Second Petition for Rehearing, so that the trial court may be fully advised as to the exact portion of the testimony involved, the contentions of counsel and the ruling of this court with respect thereto;

That the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, be requested to return the record with the aforesaid statement of the trial court included therein, duly certified, as soon as conveniently possible;

That jurisdiction of this action be retained by this court and that its mandate be stayed until the record is returned and the appeal is disposed of in accordance therewith.

II.

That in the event that the foregoing motion is denied by this Honorable Court, the mandate in the above-entitled matter be stayed for 30 days and for such further time as may be extended by order of the court, pending the filing of an application by the plaintiff-appellee for a writ of certiorari in the Supreme Court of the United States, the preparation of the record, petition and brief, and action thereon in the Supreme Court.

Ben W. Heineman,
Joseph D. Block,
Attorneys for Plaintiff-Appellee.

APPENDIX "A".

The following is the portion of the testimony by deposition of Gabriel H. Todes referred to in the foregoing motion and appearing at pages 20-21 of the printed transcript of record filed in the United States Circuit Court of Appeals for the Seventh Circuit:

"Q. Did you make an arrangement with him to act as a salesman for his firm? A. Yes, I got in touch with Mr. Roman and wrote him a letter asking him if he had any connection whatsoever where he could get merchandise from Mexico to sell in the United States.

"Q. Do you recall when that was? A. It was in the very early part of 1944. I called him on the 'phone first and then I wrote him a letter.

"Q. When did you first start selling merchandise as a salesman for International Industries? A. In January, 1944.

"Q. You made some sales, did you? A. I made quite a number of sales.

"Q. What commodity did you sell? A. I sold Tequila.

"Q. Mexican Tequila? A. Mexican Tequila.

"Q. What other commodity? A. Gin. That came from Argentine, and some of it came from Mexico. I sold thousands of cases of the Tequila."

AFFIDAVIT OF SERVICE.

State of Illinois } ss.
County of Cook }

Joseph D. Block, being first duly sworn on oath, deposes and says that he has this day mailed to Nat M. Kahn, 33 South Clark Street, Chicago, Illinois, attorney for defendants-appellants, a copy of the foregoing motion.

Joseph D. Block.

Subscribed and Sworn to before me this 18th day of April, 1947.

Rita Stacy,
Notary Public.

Endorsed: Filed April 18, 1947. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the eighteenth day of April, 1947, the following further proceedings were had and entered of record, to-wit:

Friday, April 18, 1947.

Court met pursuant to adjournment.

Before:

Hon. Sherman Minton, Circuit Judge.

Globe Liquor Company, Inc., a Corporation, *Plaintiff-Appellee,* vs. Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, *Defendants-Appellants.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

9146

It is ordered that the motion of counsel for plaintiff-appellee to remit the record to the Trial Court be, and the same is, hereby denied.

It is further ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed for a period of thirty (30) days pursuant to the provisions of Rule 25 of the Rules of this Court.

And afterwards, to-wit: On the twenty-fourth day of April, 1947 there was filed in the office of the Clerk of this Court a Praecipe for record on petition for writ of certiorari in the United States Supreme Court of the United States, which said Praecipe for Record is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 9146

Globe Liquor Company, Inc., a Corporation, *Plaintiff-Appellee,* vs. Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, *Defendants-Appellants.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Hon. John P. Barnes, Judge Presiding.

9146

PRAECIPE FOR RECORD ON PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES.

To Hon. Kenneth J. Carrick, Clerk:

Please prepare a certified transcript of the record in the United States Circuit Court of Appeals for the Seventh Circuit in the above entitled matter, for use on petition for writ of certiorari in the Supreme Court of the United States, including therein particularly the following:

1. Transcript of record of the District Court of the United States for the Northern District of Illinois, Eastern Division, filed July 19, 1946 and printed and filed in this Court October 28, 1946.
2. Entry showing submission of cause on record, briefs and oral argument.
3. The opinion of this Court filed February 14, 1947.
4. Judgment of the Court.

5. Petition of plaintiff-appellee for rehearing and memorandum in support thereof.

6. Motion of plaintiff-appellee for leave to file memorandum of additional authorities in support of petition for rehearing and the order of the Court granting said motion.

7. Opinion of the Court on petition for rehearing.

8. Motion of plaintiff-appellee for leave to file second petition for rehearing and second petition for rehearing.

9. Motion of defendants-appellants relative to plaintiff-appellee's second petition for rehearing and motion of defendants-appellants for modification of certain language in the opinion, and suggestions of defendants-appellants in support of foregoing motion.

10. Order of the Court denying the motions specified in numbers 8 and 9 hereof.

11. Motion of plaintiff-appellee to remit record to trial court or in the alternative for stay of mandate.

12. Order of the Court denying plaintiff-appellee's motion to remit record to trial court and order staying the issuance of the mandate.

Globe Liquor Company, Inc.,
By Ben W. Heineman,
Attorney for plaintiff-appellee.

State of Illinois }
County of Cook } ss.

Joseph D. Block, being first duly sworn, on oath deposes and says that he has this day mailed by first class mail a copy of the foregoing Praecipe for Record to Mr. Nat M. Kahn, 33 South Clark Street, Chicago 3, Illinois, attorney for defendants-appellants.

Joseph D. Block.

Subscribed and sworn to before me this 24th day of April, 1947.

Rita Stacy,
(Seal) *Notary Public.*

Endorsed: Filed April 24, 1947. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the second day of May, 1947, there was filed in the office of the Clerk of this Court a Supplemental Praecipe for Record On Petition for Writ of Certiorari in the Supreme Court of the United States, which said Supplemental Praecipe for Record, is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No 9146

Globe Liquor Company, Inc., a corporation, *Plaintiff-Appellee,* *vs.* Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries, *Defendants-Appellants.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable John P. Barnes, Judge Presiding.

SUPPLEMENTAL PRAECIPE FOR RECORD ON PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES.

To Hon. Kenneth J. Carrick, Clerk:

Please include in the certified transcript of the record in the United States Circuit Court of Appeals for the Seventh Circuit in the above-entitled matter, for use on petition for writ of certiorari in the Supreme Court of the United States, in addition to the matters listed in the Praecipe for Record heretofore filed, the following:

Order of the Court denying plaintiff-appellee's Petition for Rehearing.

Globe Liquor Company, Inc.,
By /s/ Ben W. Heineman,
Ben W. Heineman,
Attorney for plaintiff-appellee.

Endorsed: Filed May 2, 1947. Kenneth J. Carrick, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the papers filed and the proceedings had, made in accordance with the Praecipe for record on petition for Writ of Certiorari in the Supreme Court of the United States, filed on April 24, 1947, in:

Cause No. 9146.

Globe Liquor Company, a corporation,
Plaintiff-Appellee,

vs.

Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries,
Defendants-Appellants,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 7th day of May, A. D. 1947.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. _____

GLOBE LIQUOR COMPANY, INC., A CORPORATION,
Petitioner,

vs.

FRANK SAN ROMAN AND DOROTHEA SAN ROMAN, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF INTERNATIONAL INDUSTRIES,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes Globe Liquor Company, Inc., plaintiff-appellee below, by its duly authorized attorneys, Ben W. Heineman and Joseph D. Block, and prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered on February 14, 1947 (R. 232), rehearing denied, April 14, 1947 (R. 260).

In support of this petition, your petitioner respectfully shows:

Opinions Below

The District Court did not prepare or publish an opinion. The opinion of the Circuit Court of Appeals and its opinion on rehearing (R. 230, 257), are reported in 160 F. (2d) 800.

Jurisdiction

This Court's jurisdiction is evoked pursuant to the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, amending and reenacting Section 240(a) of the Judicial Code, 28 U.S.C.A. §347.

Summary Statement of Matter Involved

The petitioner, a Delaware corporation, recovered judgment against the respondents, citizens of Illinois, in the United States District Court for the Northern District of Illinois, Eastern Division, sitting in Chicago, on a directed verdict for damages in the sum of $9,704.25 resulting from the breach of an implied warranty in the sale by the respondents to the petitioner of 750 cases of imported Mexican Tequila.[1]

Briefly summarized, the evidence disclosed that one Todes, a salesman for the defendants, obtained an order from the plaintiff for 750 cases of Mariachi Tequila (Gold) at a price of $10.75 a case, C.I.F. Laredo, Texas (R. 178-180, 63, 65, 66). The plaintiff was required by the defendants to give, and it did give to the defendants, an irrevocable letter of credit in the full amount of the purchase price (R. 183, 80). In due course the Tequila was shipped from Mexico, the letter of credit was negotiated, and the purchase price paid in full by the plaintiff. Thereafter, upon inspec-

[1] For convenience, the petitioner is sometimes referred to hereafter as the "plaintiff" and the respondents as the "defendants".

tion in Philadelphia, the entire shipment was condemned by representatives of the Food and Drug Administration as being adulterated with glass particles (R. 185-189, 87, 90).

At the conclusion of all of the evidence, the defendants filed their written motion for an instructed verdict upon the grounds that they were not principals in the transaction but had acted merely as the agents of a disclosed principal in Mexico, and that the evidence that a portion of the shipment of Tequila was adulterated was insufficient to justify the plaintiff's rejection of the entire shipment (R. 202). This motion was denied and the plaintiff's motion for a directed verdict was granted (R. 176, 177).

Defendants made no motion under Rule 50(b) of the Federal Rules of Civil Procedure to have judgment entered in accordance with their motion for a directed verdict. Their motion for a new trial was denied (R. 209).

Defendants thereupon appealed to the United States Circuit Court of Appeals for the Seventh Circuit. On February 14, 1947, the Circuit Court of Appeals rendered its decision determining that the complaint alleged and that the plaintiff had relied upon an express warranty, that there was no evidence of an express warranty, and that the trial court, accordingly, had erred not only in directing a verdict for the plaintiff but in failing to direct a verdict for the defendants. The judgment of the District Court was reversed with instructions to grant defendants' motion for a directed verdict and enter judgment thereon (R. 230-232). This despite the fact that defendants had made no motion under Rule 50(b) of the Federal Rules of Civil Procedure for judgment in accordance with their motion for a directed verdict, and despite the further fact that the ground upon which the Circuit Court of Appeals rested its reversal had not been specified by the defendants in their motion for a directed verdict, nor had the point been raised by them in any other way before the trial court.

In determining that it had authority to reverse with instructions to grant defendants' motion for a directed verdict and to enter judgment thereon, rather than to reverse and remand for a new trial, the Circuit Court of Appeals relied upon four decisions of other Circuit Courts of Appeals (R. 231). One of these was *West Virginia Pulp & Paper Co.* v. *Cone*, 153 F. (2d) 576 (C.C.A. 4th, 1946) then awaiting decision in this Court.[2]

Thereupon, plaintiff filed its petition for rehearing (R. 233), pointing out that even on the assumption that the Circuit Court of Appeals had properly construed the complaint as alleging an express warranty, the record evidence clearly disclosed the existence of an implied warranty of merchantable quality under Section 15(2) of the Illinois Uniform Sales Act and its breach by the defendants.[3]

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[2] Each of the other three cases relied upon by the Circuit Court of Appeals had theretofore been reversed by this Court on other grounds, although the fact of reversal was not indicated by the Circuit Court of Appeals in its opinion. *Halliday* v. *United States*, 315 U.S. 94 (1942); *Berry* v. *United States*, 312 U.S. 450 (1941); *Conway* v. *O'Brien*, 312 U.S. 492 (1941)

[3] Section 15(2) of the Illinois (Uniform) Sales Act (Ill. Rev. Stats. 1945 c. 121½, § 15(2)) provides as follows:

> "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be of merchantable quality."

Both parties, as well as the Circuit Court of Appeals, agreed that Illinois law was applicable (R. 258).

The complaint alleged that "the defendants agreed to sell and deliver to the plaintiff seven hundred and fifty (750) cases of Mexican Tequila, more fully described as Mariachi Tequila Gold, in good merchantable condition, fit for human consumption" (R. 3). The plaintiff never contended that an express warranty existed and never made any effort to offer any such proof but proceeded throughout upon the theory of an implied warranty. Plaintiff believes, and so asserted in its petition for rehearing, that the construction of this allegation by the Circuit Court of Appeals was unduly harsh and technical and violative of Rule 8(f) of the Federal Rules of Civil Procedure which requires all pleadings to be "so construed as to do substantial justice" (R. 252-253).

Accordingly, the plaintiff urged that, in accordance with the provisions of Rule 15(b) of the Federal Rules of Civil Procedure, the complaint should be treated as amended to conform to that evidence by alleging the breach of an implied warranty.[4]

Under Section 15(2) of the Illinois Sales Act, an implied warranty is established (a) if the goods were bought by description, and (b) if the defendants were dealers in goods of that description. The petition recited the evidence showing that the goods had been bought by plaintiff, not by inspection or sample, but by description as Mariachi Tequila (Gold), and that the defendants were dealers. This last was shown by the testimony of defendants' witness and salesman, Todes, to the effect that he had "made quite a number of sales" of the Tequila for defendants and that he had "sold thousands of cases of the Tequila" (R. 243-244). In the plaintiff's view, this evidence required rehearing and affirmance of the judgment of the District Court.

Subsequent to the filing of the petition for rehearing, this Court entered its decision in *Cone* v. *West Virginia Pulp and Paper Co.*, ____ U.S. ____, 67 S. Ct. 752 (1947); reversing the decision of the Circuit Court of Appeals for the Fourth Circuit. Thereupon, plaintiff was granted leave to file a memorandum of additional authorities in support of its petition for rehearing (R. 255-256). The plaintiff pointed out that the decisions relied upon by the Circuit Court of

---

[4] Rule 15(b) of the Federal Rules of Civil Procedure provides, insofar as pertinent, as follows:

> "(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues."

Appeals as authority for its final disposition of the case had been reversed or overruled by the *Cone* case and that, under the circumstances here present, and in view of this Court's decision in the *Cone* case, the Circuit Court of Appeals was without power to reverse with instructions to the trial court to grant defendants' motion for a directed verdict and to enter judgment thereon, but possessed only the power of reversing and remanding for further proceedings.

On April 14, 1947, the Circuit Court of Appeals denied the petition for rehearing with a written opinion (R. 257). The Court conceded that under Rule 15(b) of the Federal Rules, where evidence is admitted which proves a case different from that alleged in the complaint, the pleadings may be considered as amended to conform to the evidence thus introduced. The Court further stated that the goods had been sold by description (R. 258). However, with respect to the second essential element of an implied warranty, the Court mistakenly stated that the evidence relied upon by plaintiff to show that the defendants were dealers had been kept out of the record on the objection of the plaintiff, and, hence, that the plaintiff could not claim the benefit of evidence which it had had excluded (R. 258). As to its authority finally to dispose of the case in the manner in which it did, the Circuit Court of Appeals took the position that Rule 50(b) of the Federal Rules was not applicable to a case in which the trial court directed a verdict and that "We do not think the Supreme Court's action in the *Cone* case should cause us to disturb our ruling . . . " (R. 260).

Plaintiff immediately sought leave to file its second petition for rehearing (R. 261), for the purpose of showing that the evidence which the Circuit Court of Appeals had

refused to consider was in fact admitted into evidence and included in the record and, therefore, could serve as the basis for treating the pleadings as amended under Rule 15(b) of the Federal Rules. Defendants also filed a motion for a modification of so much of the language in the Court's opinion upon rehearing as stated that no part of the deposition of Todes (which contained the evidence relied upon by plaintiff to establish that the defendants were dealers) was ever read or considered as read in evidence (R. 262-263, 266). By their respective motions, both the plaintiff and the defendants asserted that the Court had misread the record. The Circuit Court of Appeals (by Judge Minton acting alone) denied both motions (R. 267).

In order to exhaust every possible remedy for the correction of the gross injustice resulting from the refusal of the Circuit Court of Appeals to consider testimony duly admitted into evidence, the plaintiff next filed its motion, pursuant to Rule 75(h) of the Federal Rules, to remit the record to the trial court for the purpose of having the trial judge certify whether the evidence in question had in fact been admitted into evidence. The Court (Judge Minton again acting alone) also denied this motion (R. 268-271).

Questions Presented

I. Whether the Circuit Court of Appeals erred,

A. In refusing to consider testimony admitted into evidence and a part of the record on appeal, or

B. If the record was ambiguous as to the District Court's rulings, in refusing to remit the record to the District Judge, pursuant to Rule 75(h) of the Federal Rules, for his certificate as to whether the testimony relied on had been admitted into evidence and was a part of the record on appeal,

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JUL 11 1947
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 205

GLOBE LIQUOR COMPANY, INC., A CORPORATION,
Petitioner,

vs.

FRANK SAN ROMAN AND DOROTHEA SAN ROMAN,
DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF
INTERNATIONAL INDUSTRIES,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BEN W. HEINEMAN,
JOSEPH D. BLOCK,
Attorneys for the Petitioner.

BEN HEINEMAN & ANTONOW,
Suite 1406
135 South LaSalle Street
Chicago 3, Illinois
Of Counsel

LINCOLN PRINTING COMPANY, CHICAGO—WABASH 4004

and if such testimony was admitted into evidence and a part of the record on appeal, whether the judgment of the District Court should be affirmed.

II. Whether, under Rule 50(b) of the Federal Rules of Civil Procedure and *Cone* v. *West Virginia Pulp & Paper Co.*, ... U. S. ....., 67 S. Ct. 752 (1947), the Circuit Courts of Appeals have power, where both parties moved for directed verdicts and a verdict was directed for the plaintiff, to reverse and remand with instructions to grant defendants' motion for a directed verdict and to enter judgment thereon, in the absence of a motion by defendants for judgment in accordance with their motion for a directed verdict.

III. Whether, under Rule 50 of the Federal Rules of Civil Procedure, the Circuit Courts of Appeals have power to direct the District Court to grant a motion for a directed verdict and enter judgment thereon upon grounds not specified in the motion for a directed verdict.

IV. Whether the Circuit Court of Appeals denied trial by jury to the plaintiff in violation of the Seventh Amendment to the United States Constitution in directing the District Court to grant defendants' motion for a directed verdict, and to enter judgment thereon, upon grounds not stated in the defendants' motion, and, hence, not reserved for later determination by Rule 50(b) of the Federal Rules of Civil Procedure.

V. Whether, assuming that questions I through IV are answered adversely to petitioner's contentions, it was arbitrary, capricious and an abuse of discretion under the circumstances of this case for the Circuit Court of Appeals to reverse with instructions to the District Court to grant defendants' motion for a directed verdict and to enter judgment thereon rather than to remand for a new trial.

Reasons for Granting Certiorari

I.

The Circuit Court of Appeals decided a question of importance under the Federal Rules of Civil Procedure in a manner in conflict with the decision of this Court in Cone v. West Virginia Pulp & Paper Co.

The Circuit Court of Appeals reversed the judgment of the District Court in favor of the plaintiff and directed the District Court to grant the defendants' motion for a directed verdict and to enter judgment thereon in favor of defendants. The defendants had made no post-verdict motion pursuant to Rule 50(b) for judgment in accordance with their motion for a directed verdict.

In *Cone* v. *West Virginia Pulp & Paper Co.*, ... U.S. ....., 67 S. Ct. 752 (1947), for the reasons there stated this Court made clear that a party's failure to make such a post-verdict motion constituted an insuperable barrier to the entry by the Circuit Court of Appeals of a final judgment for the party losing below. This case is precisely like the *Cone* case except that here the jury returned its verdict at the direction of the District Court rather than as its own independent action. Although this may constitute a distinction in fact, it does not warrant a different result.

The Circuit Court of Appeals held this distinction to be controlling. It determined that Rule 50(b) had application "only to cases where the matter is submitted to a jury for its independent voluntary consideration and verdict" (R. 259-260). This conclusion is erroneous in that it is contrary both to the express language of Rule 50(b) and its purpose as announced by this Court in the *Cone* case.

Rule 50(b) is as follows:

> "(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all

the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

In requiring the party whose motion for a directed verdict had been denied to move for judgment in accordance with his motion for a directed verdict before a Circuit Court of Appeals can dispose finally of the proceedings, Rule 50(b) draws no distinction between whether the jury returned the verdict as its independent act, whether it returned the verdict at the direction of the trial court, or, indeed, whether it failed to return any verdict at all. The Rule deals uniformly with motions for directed verdicts and their consequences under all possible circumstances. It divides the possibilities into two categories: either a verdict was received, or it was not returned and the jury was discharged. Here, as in the *Cone* case, the verdict was received (R. 203).

The District Court recognized that even where a verdict is directed, it is essential that the verdict be returned by the jury and received by the judge (R. 203-204). We take it that there is no question but that a directed verdict

is one returned and received within the meaning of Rule 50(b) as fully as though it had been the independent act of the jury. This accords with what has always been the view taken by this Court of a directed verdict. Thus, in *Hodges* v. *Easton*, 106 U. S. 408 (1882), the Court, speaking through Mr. Justice Harlan, said (at 412):

> "Upon the trial, if all the facts essential to a recovery were undisputed, or if they so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a peremptory instruction to find for plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court."[5]

Even if for any reason the fact that the verdict was directed may suggest that it was not returned or received within the meaning of Rule 50(b), the post-verdict motion for judgment would still be required since this case must then be regarded as falling within the other category established by the Rule; that is, that the jury was discharged without returning the verdict. This seems to us, however, to be contrary not only to the record facts which disclose that a jury verdict was returned and received (R. 203-204), but contrary to the historical conception of directed verdicts. *Hodges* v. *Easton, supra.*

The Circuit Court of Appeals approached the question from the wrong end of the stick. What it regarded as controlling was the submission of the issues to the jury for their independent consideration, whereas what the Rule treats as controlling is the preservation to the trial judge of a subsequent and more leisurely opportunity both to

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[5] This suggests the existence of quite another defect in the judgment of the Circuit Court of Appeals. It is not clear to us how the Circuit Court of Appeals can instruct a District Court to direct a verdict where the jury has already been discharged. This paradox underscores the requirement of Rule 50(b) for a post-verdict motion for judgment in order to provide the foundation for the final disposition of the proceedings on appeal.

determine whether he had erred, and if he had, to determine in his initial discretion whether the entry of judgment or the granting of a new trial would provide the most appropriate vehicle for the correction of that error. So viewed, it is clear that in interpreting Rule 50(b) and in distinguishing the *Cone* case, the Circuit Court of Appeals was guided by immaterial criteria not to be found in the Rule. The effect of its action is to rewrite Rule 50(b) so as to carve out an exception for directed verdict cases where none exists.

In its decision in the *Cone* case, this Court set forth in detail the reasons for its conclusion that Rule 50(b) required a party to move for judgment in accordance with his motion for a directed verdict in order to confer power upon the Circuit Court of Appeals to direct the entry of judgment in his favor. This Court pointed out that Rule 50(b) is in the alternative and confers upon the trial court the discretion to reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. This Court emphasized the importance of the peculiarly informed discretion and judgment of the trial court in determining whether a new trial, rather than a final termination of the trial stage of the controversy, would better serve the ends of justice. It was pointed out that the trial judge had the "feeling of the case which no appellate printed transcript can impart." Moreover, this Court further emphasized the practical reasons underlying Rule 50(b) which compel the same result. The Court stressed the situation where, because of the failure of an essential element of proof which could be supplied, the plaintiff has the right under Rule 41(a)(2) to apply to the trial court for a dismissal without prejudice. These reasons are of controlling validity regardless of whether the jury's verdict was its independent act or the consequence of the court's direction.

In addition to their general validity, these reasons are particularly applicable here. As has heretofore been pointed out, and as will be stressed hereafter, the Circuit Court of Appeals directed the entry of final judgment for the defendants because of what is at most a technical defect in the complaint and in the face of existing uncontradicted testimony (whether or not admitted into evidence) which would cure that defect. Under such circumstances it is inconceivable that a trial court at the trial stage would have finally foreclosed the plaintiff from remedying the alleged deficiency if it had been pointed out to him by an appropriate motion.

Wholly apart from the conflict of the decision of the Circuit Court of Appeals with that of this Court in the *Cone* case, the question presented is an important federal question which should be settled by this Court, involving, as it does, not only the power of the Circuit Courts of Appeals under frequently recurring circumstances, but the daily motion practice of the trial bar.

II.

The instruction to the District Court to grant the defendants' motion for a directed verdict was based upon grounds not specified in defendants' motion. This presents an important federal question as to the proper interpretation of Rule 50 of the Federal Rules, which has not been, but should be, decided by this Court, and in addition, decides a constitutional question in a way probably in conflict with applicable decisions of this Court.

There is no doubt but that the Circuit Court of Appeals rested its judgment instructing the District Court to grant the defendants' motion for a directed verdict upon grounds not specified in that motion. The Circuit Court of Appeals relied solely and expressly upon the ground that the complaint had alleged, and the plaintiff had relied upon, an

express warranty as to which there was a total failure of proof (R. 231). On denial of the petition for rehearing, the Circuit Court of Appeals determined (contrary to the fact) that the proof relied upon by the plaintiff as establishing an implied warranty was not in the record (R. 258).

Neither of these grounds had been specified or intimated in the defendants' motion for a directed verdict, which the Circuit Court of Appeals directed the District Court to grant (R. 202). As a matter of fact, the third ground of the defendants' motion for a directed verdict assumed the existence of a warranty and argued merely that the evidence was insufficient to establish such a breach as would entitle the plaintiff to reject the entire shipment (R. 202).

Rule 50(a) requires that a motion for a directed verdict shall "state the specific grounds therefor".[6] Rule 50(b) provides that if such motion is not granted, the action is submitted to the jury subject to the later determination of the "legal questions raised by the motion", and authorizes a motion to have "judgment entered in accordance with [the party's] motion for a directed verdict." The Rule, therefore, discloses a coherent scheme to require the grounds for the motion for a directed verdict to be fully displayed and to give both the trial court and the other party a full and repeated opportunity for mature consideration of such grounds. The Circuit Court of Appeals read the Rule as though the quoted language were omitted.

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[6] Rule 50(a) is as follows:

"(a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor."

It determined that the District Court had erred in not doing what it was never asked to do.

The effect of the decision is to permit appeals based upon errors lurking in the record which might have been corrected either by the parties or the trial court had they been appropriately raised. This Court pointed out in the *Cone* case that the motion under Rule 50(b) for judgment in accordance with the motion for a directed verdict afforded the trial judge a last change to correct his errors. This becomes a futile last chance indeed if a party need not specify his grounds in his motion for a directed verdict. The considerations which were so compelling in connection with a motion for judgment in accordance with a motion for a directed verdict are equally or even more compelling in connection with the motion for a directed verdict itself.

As the notes of the Advisory Committee on Rules for Civil Procedure show, the requirement of Rule 50(a) that a motion for a directed verdict shall state the specific grounds therefor, was intentionally adopted for the purpose of resolving a conflict between the Circuit Courts of Appeals over the correct federal practice. In addition, under Rule 50, other Circuit Courts of Appeals have consistently assumed that the motion for a directed verdict must specify its grounds before such grounds will be noticed upon appeal. *Virginia-Carolina Tie & Wood Co.* v. *Dunbar*, 106 F. (2d) 383 (C.C.A. 4th, 1939); *Atlantic Greyhound Corporation* v. *McDonald*, 125 F. (2d) 849 (C.C.A. 4th, 1942); *Ryan Distributing Corp.* v. *Caley*, 147 F. (2d) 138 (C.C.A. 3rd, 1945) *cert. den.* 325 U.S. 859 (1945).

Moreover, in applying Rule 50 as it did, the Circuit Court of Appeals has revived substantial constitutional questions that were intended to be put at rest forever by the Federal Rules. In *Slocum* v. *New York Life Insurance Co.*, 228 U.S. 364 (1913), it was held to be a re-examination of the

facts contrary to the common law and hence to the Seventh Amendment for a Circuit Court of Appeals to direct a judgment where the legal questions raised by a motion for a directed verdict had not been reserved for later determination. In *Baltimore & Carolina Line* v. *Redman*, 295 U.S. 654 (1935) this Court approved the final disposition of the proceedings by a Circuit Court of Appeals where the legal questions raised by the motion to direct a verdict had been expressly reserved by the trial court. In *Aetna Insurance Co.* v. *Kennedy*, 301 U.S. 389 (1937), where the motions of both parties for directed verdicts had been denied and the issues submitted to the jury unconditionally, this Court reaffirmed the *Slocum* case and held the Circuit Court of Appeals to be without power on reversal to direct judgment for the losing party below.

One of the purposes of Rule 50(b) was to avoid the constitutional questions considered in the *Slocum* case by making automatic the reservation approved in the *Redman* case for the later determination of the legal questions raised by the motion for a directed verdict.

Only legal questions actually raised by the motion for a directed verdict are reserved by Rule 50(b) for later determination. Under Rule 50(a) a motion for a directed verdict raises only the legal questions specified. It follows, therefore, that since the decision of the Circuit Court of Appeals was based on grounds not specified in defendants' motion for a directed verdict, it was based on legal questions not reserved for later determination by Rule 50, and hence, is in direct conflict with the decisions of this Court in *Slocum* v. *New York Life Insurance Co.*, *supra*, and *Aetna Insurance Co.* v. *Kennedy*, *supra*. Under these cases the plaintiff has been deprived of its right to trial by jury as guaranteed by the Seventh Amendment.

III.

The refusal by the Circuit Court of Appeals to consider testimony admitted in evidence and a part of the record on appeal constitutes such a clear departure from the accepted and usual course of judicial proceedings as to require the exercise of this Court's power of supervision to prevent a gross miscarriage of justice.

We have heretofore pointed out that in denying the petition for rehearing, the Circuit Court of Appeals refused to consider certain uncontradicted evidence relied upon by the plaintiff to establish the second essential element of an implied warranty under Section 15(2) of the Illinois Uniform Sales Act; namely, that the defendants were dealers in Tequila (*supra* pp. 6-7). The Court mistakenly stated that this evidence had been kept out of the record during the trial at plaintiff's objection, that the plaintiff could not claim the benefit of evidence which it had had excluded and that it "cannot be allowed to blow hot and cold after such a fashion" (R. 258).

The evidence in question was contained in the deposition of one Gabriel Todes, a salesman employed by the defendants, and is as follows (R. 20-21):

"Q. When did you first start selling merchandise as salesman for International Industries?
A. In January, 1944.

Q. You made some sales, did you?
A. I made quite a number of sales.

Q. What commodity did you sell?
A. I sold Tequila.

Q. Mexican Tequila?
A. Mexican Tequila.

Q. What other commodity?
A. Gin. That came from Argentine, and some of it

> came from Mexico. I sold thousands of cases of the Tequila.'"

During the trial, this deposition, which had been taken on behalf of the defendants, was duly opened in open court (R. 143) and was presented to the trial judge out of the presence of the jury for the purpose of obtaining his rulings on plaintiff's objections to certain portions thereof.[8] In the course of presenting the deposition to the trial court, certain of the plaintiff's objections were sustained and certain others were overruled. The record shows indisputably that the first objection made by plaintiff was to a question appearing on page 6 of the deposition. The first question objected to by plaintiff's attorney was as follows:

> "Q. What were his oral instructions to you relative to the taking of orders or selling of merchandise in his behalf?" (R. 144)

An examination of the deposition shows clearly that the evidence relied upon by the plaintiff and quoted above immediately preceded the question to which the plaintiff's first objection was made (R. 21).

At the conclusion of the trial defendants' counsel noticed that he had inadvertently failed to make a formal offer into evidence of those portions of the deposition as to which

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[7]The Circuit Court of Appeals did not suggest that this evidence was insufficient to establish that defendants were dealers in goods of the description here involved, as indeed the evidence is too compelling to permit such a suggestion. Rather, the Court stated:

> "The trouble with this evidence is that it is not in the record and was kept out on the objection of the plaintiff. No part of the deposition was ever read or considered as read in evidence. No part of the deposition was ever admitted. There was some colloquy in the judge's chambers about the deposition, but nothing was ever done in open court about it." (R. 258).

[8] It is appropriate here to explain the organization of the printed record. The deposition was filed with the Clerk in advance of trial and is set out in its entirety in the record at pages 19-49, both inclusive, as filed at that time. The proceedings in open court with respect to the deposition appear at pages 143-160, both inclusive.

objections had not been sustained. He then sought and obtained the consent of plaintiff's counsel and the ruling of the trial court to the effect that such portions would be considered as though they had been introduced into evidence. The record discloses that the following transpired (R. 177):

> "By Mr. Kahn: I just called Mr. Heineman's attention that I assume from our comment as we went along on the Todes deposition that what went out will stay out, it will simply be offered as an offer of proof, and the few fragments that were left in will be considered as introduced in the record. I did not take the time or the trouble to read those in.
>
> "By the Court: They were not introduced.
>
> "By Mr. Kahn: I know they were not and that is why Mr. Heineman is now consenting to let me put them in.
>
> "By Mr. Heineman: He inadvertently omitted it and I am reluctant frankly to take advantage of an omission by counsel which I know is inadvertent.
>
> "By the Court: You are agreeing that those fragments to which objections were not sustained may go in?
>
> "By Mr. Heineman: I am agreeing that they may go in.
>
> "By the Court: That only had to do with the direct testimony.
>
> "By Mr. Heineman: That is correct.
>
> "By the Court: Very well" (R. 177-178).

It was in the face of this that the Circuit Court of Appeals stated that "No part of the deposition was ever read or considered as read in evidence. No part of the deposition was ever admitted" (R. 258).

Even counsel for the defendants was quick to suggest to the Circuit Court of Appeals that it had erred in so concluding (R. 262, 266). The defendants pointed out to the

court that certain portions of the deposition upon which *they* relied had in fact been admitted into evidence, but denied the admission of the first six pages of the deposition (R. 19-21) upon which the plaintiff relied. Defendants requested the Circuit Court of Appeals to modify its conclusion that no part of the deposition had been admitted (R. 262-264, 266). This position of defendants is patently inconsistent. Although they urge that certain later portions of the deposition were admitted pursuant to the agreement of counsel, they deny without basis that the first six pages of the deposition were admitted, although these pages contain such basic information as the witness' name, address, occupation and relationship to the defendants.

The agreement between counsel and the ruling thereon by the District Court makes clear that all portions of the deposition as to which objections were not sustained were admitted into evidence. None was made or sustained to the evidence relied upon by plaintiff. The refusal by the Circuit Court of Appeals to consider that evidence constitutes such a departure from the accepted course of judicial proceedings and works such a gross injustice to the plaintiff, as to require the supervision of this Court.

The clarity of the record quoted above with respect to the admission of the evidence relied upon by the plaintiff strongly suggests that the Court failed to read that portion of the record, although it was twice expressly brought to its attention (R. 243-244, 261). However, even assuming that the record is ambiguous as to the scope of the trial court's ruling on the admission of the evidence relied upon, the Circuit Court of Appeals erred in denying plaintiff's motion under Rule 75(h) of the Federal Rules, for the remission of the record to the District Court for the purpose of having the trial judge certify whether or not the testimony had in fact been admitted into evidence. If the record on this can be said to be susceptible to a legitimate difference of opinion, the resolution of that difference is

peculiarly a matter within the province of the trial judge. Rule 75(h) was designed for such a situation, and in the event that the record is in fact ambiguous, the mandatory language of the Rule can not be ignored. Rule 75(h) provides in part as follows:

> "(h). *Power of Court to Correct Record.* It is not necessary for the record on appeal to be approved by the district court or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth."

The refusal to remit the record to the District Court conflicts with the decision and practice of the Circuit Court of Appeals for the Eighth Circuit as announced in *Beck* v. *Federal Land Bank of Houston*, 146 F. (2d) 623 (C.C.A. 8th, 1945) and probably with that of the Court of Appeals for the District of Columbia. *Cf. Reynolds* v. *Imlay*, 118 F. (2d) 53 (App. D.C. 1941).

WHEREFORE, the petitioner prays for the allowance of a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit in the case entitled *Globe Liquor Company, Inc., plaintiff-appellee,* v. *Frank San Roman, et al, defendants-appellants,* No. 9146, in order that this case may be reviewed and determined by this Honorable Court.

GLOBE LIQUOR COMPANY, INC.

By: BEN W. HEINEMAN,
JOSEPH D. BLOCK,
Attorneys for Petitioner

SWIRSK HEINEMAN & ANTONOW
Suite 1406
135 South LaSalle Street
Chicago 3, Illinois
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No. 205

GLOBE LIQUOR COMPANY, INC., A CORPORATION,
Petitioner,

v.

FRANK SAN ROMAN and DOROTHEA SAN ROMAN, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF INTERNATIONAL INDUSTRIES,
Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR CERTIORARI

BEN W. HEINEMAN,
JOSEPH D. BLOCK,
Attorneys for Petitioner.

SWIREN HEINEMAN & ANTONOW,
Suite 1406
135 South LaSalle Street
Chicago 3, Illinois
Of Counsel

LINCOLN PRINTING COMPANY, CHICAGO—WABASH 4004.

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MAY IT PLEASE THE COURT:

Much of what the respondents have said is irrelevant to whether the legal questions presented are of sufficient consequence to warrant review by this Court. We conceive that to be the only issue. We shall, therefore, resist the temptation to answer the many erroneous statements of fact and law contained in respondents' brief and shall confine this

reply to so much of the respondents' brief as controverts the reasons for granting certiorari.[1]

I.

The conflict of the decision below with that of this Court in Cone v. West Virginia Pulp & Paper Co. and the importance of making clear that Rule 50(b) applies to directed verdict cases combine to require that certiorari be granted.

The Circuit Court of Appeals and the respondents have taken the position that Rule 50(b) is without application where the trial court has directed a verdict for the other party. This conclusion is rested upon the view, first, that the history, language and purpose of Rule 50(b) preclude its application in such cases, and second, that in directing a verdict, the trial court was exercising its judgment only with respect to a question of law and that the Circuit Court of Appeals was thereby authorized to reverse and finally terminate the litigation. To drive home this last argument, respondents devote a considerable portion of their brief to attempting to demonstrate that there is no question for the jury present in this case, and at page 14 erroneously distinguish the *Cone* case by asserting that there "the facts were controverted and still required a trial by jury."

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[1] Perhaps the most blatant misstatement is that appearing on page 5 and frequently throughout respondents' brief that:

> "In the instant suit, as amplified later, it will be seen that only questions of law were involved, that all of the facts were undisputed and the petitioner's proof was fully developed, and that there was no question of any missing element of proof or missing witnesses in behalf of the petitioner."

In their motion for a new trial, respondents advised the trial court that there were at least five "contested questions of fact" presented by the evidence of both the plaintiff and defendants (R. 205-206). The Circuit Court of Appeals denied rehearing expressly upon the ground that an essential element of petitioner's proof had not been made a part of the record (R. 258).

Both the Circuit Court of Appeals and the respondents misread the *Cone* case. In that case, this Court assumed that the Circuit Court of Appeals was correct in determining that there were no questions of fact for the jury and that only questions of law were present, but held, nevertheless, that the Circuit Court of Appeals was without power to direct the entry of final judgment in the absence of an appropriate post-verdict motion under Rule 50(b). 330 U. S. at 215. Thus, there is no distinction between the *Cone* case in the posture in which it was considered by this Court and this case as viewed by the Circuit Court of Appeals and the respondents.

The history and language of the Rule would have to be clear indeed to warrant excluding from its application denials of motions for a directed verdict merely because a verdict had been directed for the other party. There is no rational basis for such a distinction. This Court, in the *Cone* case, made clear that it was the purpose of Rule 50(b) to provide a litigant with the benefit of the trial court's judgment as to whether the proceedings should be finally terminated or a new trial or nonsuit granted. We are wholly unable to see why the plaintiff here, merely because it had a verdict directed in its favor, is less entitled to that benefit than a litigant who has received a verdict as the independent act of the jury, or who has received no verdict at all due to the failure of the jury to agree.

The opinion in the *Cone* case could have been written with the facts of this case in mind. The Circuit Court of Appeals reversed and finally terminated the litigation by directing that judgment be entered for the defendants upon the ground that the plaintiff had alleged an express warranty but had failed to prove it. The Circuit Court of Appeals then denied rehearing upon the ground that evidence establishing an implied warranty was not a part of

the record.[2] Even assuming the Circuit Court of Appeals to have been correct in its view of the record, the *Cone* case compels the conclusion that it was for the District Court and not for the Circuit Court of Appeals to determine what further proceedings should follow. In that case, this Court said (330 U. S. at 217):

> "There are other practical reasons why a litigant should not have his right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question. Take the case where a trial court is about to direct a verdict because of failure of proof in a certain aspect of the case. At that time a litigant might know or have reason to believe that he could fill the crucial gap in the evidence. Traditionally, a plaintiff in such a dilemma has had an unqualified right, upon payments of costs, to take a nonsuit in order to file a new action after further preparation, unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit."
>
> • • •
>
> "In this case had respondents made a timely motion for judgment notwithstanding the verdict, the petitioner could have either presented reasons to show why he should have a new trial, or at least asked the court for permission to dismiss. If satisfied from the knowledge acquired from the trial and because of the reasons urged that the ends of justice would best be served by allowing petitioner another chance, the judge could have so provided in his discretion." (footnote omitted)

It is inconceivable that the court would not have permitted the plaintiff to remedy the alleged deficiency in the proof if it had been brought to the court's attention at the

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[2] The evidence which the Circuit Court of Appeals refused to consider was in fact admitted into evidence and a part of the record, as the petition for certiorari shows and as respondents now concede (Pet. pp. 17-19; Resp. Br. p. 25).

trial stage of the proceedings, particularly since the allegedly missing proof was available and at hand.[3]

Nor is it permissible to say, as do the respondents, that, a verdict having been directed against them, it would be a meaningless ritual for them to move for judgment in accordance with their motion for directed verdict (Resp. Br. p. 41). It is undoubtedly true that denying the defendants' motion for an instructed verdict and directing a verdict for the plaintiff discloses a greater degree of conviction on the part of the trial court than denying the defendants' motion for an instructed verdict and submitting the issue to the jury for its independent judgment. It by no means follows that the trial court should thereby be conclusively presumed to be unwilling to correct his error if provided with the "opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone." (330 U. S. at 216)

For the reasons stated, the purpose of Rule 50(b) as announced in the *Cone* case applies with equal force whether the verdict was returned at the direction of the court, as the jury's independent action, or not at all. The Circuit Court of Appeals and the respondents, however, stress the Rule's purpose of avoiding the constitutional

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[3] The respondents made no appropriate post-verdict motion for judgment under Rule 50(b) and hence, the trial court had no opportunity to exercise his discretionary power of determining whether to enter judgment for the respondents upon their earlier motion for a directed verdict, grant petitioner a new trial or permit it to take a non-suit. At pages 40 and 41, respondents assert that their motion for a new trial "permitted the trial court to exercise its discretion and to choose between the alternative of either ordering a new trial or entering judgment for them on their prior reserved motion for a directed verdict." Quite apart from the novel view of the function of a motion for a new trial, the statement is absurd on its face. The discretion exercised by a trial court in considering *defendants'* motion for a new trial is wholly unlike the discretion protected by the *Cone* case and exercised by the trial court in considering whether a new trial should be ordered for the *plaintiff* after becoming convinced that it had erred in not granting the *defendants'* motion for a directed verdict.

difficulties of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1913). They state, either directly or by necessary implication, that these constitutional difficulties arose only where the issues were submitted without reservation to the jury for its independent action. Hence, they argue, the entire Rule was intended to deal only with this last situation and not with a directed verdict case. Neither the Circuit Court of Appeals nor the respondents cite any authority for this view.

This view is historically inaccurate. In order for the trial court or for a Circuit Court of Appeals to enter judgment for a litigant notwithstanding a verdict because of the insufficiency of the evidence, it was essential that the question of law be expressly reserved, whether the verdict was returned as the independent action of the jury or at the direction of the court. In the absence of such a reservation, the only remedy in either such case was a new trial. In *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1913), the Court held it to be a reexamination of the facts contrary to the Seventh Amendment for the Circuit Court of Appeals to direct the entry of judgment notwithstanding the verdict where the issues had been submitted to the jury without reservation of the legal question raised by the motion for a directed verdict. In the course of its opinion, the Court made clear that insofar as the constitutional objections were concerned there was no difference between a case in which the verdict was returned by the jury as its independent act and a case in which the verdict was returned at the direction of the court. In neither of such cases could judgment be ordered for the other party. A new trial was required. The Court said (at 395):

> "Equally pronounced is the difference between a demurrer to the evidence and a request for a directed verdict; for if on such a demurrer, properly joined in

and allowed, judgment is not given for the demurrant, it is necessarily given for his opponent, while if a request for a directed verdict is denied the party making the request may yet receive the jury's verdict and a judgment thereon. And when a judgment on a demurrer to the evidence is reversed because given for the wrong party, the error is corrected by ordering a judgment for the other party, *whereas when a judgment is reversed for error in granting or refusing a request to direct a verdict, judgment is not ordered for either party, but a new trial is awarded. This was so at common law, and it has been the uniform course of action in this court from the beginning.*" (Italics supplied)

A contemporary commentator also saw the *Slocum* case as applying equally to directed verdicts. *Schofield, New Trials and the Seventh Amendment*, 8 Ill. L. Rev., 287, 288-289 (1913).

In *Baltimore and Carolina Line* v. *Redman*, 295 U. S. 654 (1935), this Court approved the final disposition of the proceedings by a Circuit Court of Appeals where the legal questions raised by the motion for a directed verdict had been expressly reserved by the trial court, pointing out that this procedure was well-established at common law (at 659). The practice of reserving the legal questions in order to permit the final disposition of the proceedings without a new trial was not only followed in independent verdict cases, but also in directed verdict cases. Indeed, in the *Redman* case the Court relied upon directed verdict and nonsuit cases to illustrate the very practice that it was approving. 295 U. S. at 659-660, fn. 5. See also *Baylis* v. *Travelers Insurance Co.*, 113 U. S. 316 (1885).

It is agreed that the first sentence of Rule 50(b) was intended to obviate the constitutional objections announced in the *Slocum* case by making automatic the reservation

procedure approved in the *Redman* case. As we have shown, the same constitutional objections were raised by the *Slocum* case with respect to directed verdict cases, and the reservation procedure approved in the *Redman* case had theretofore been required to be followed in directed verdict cases as well unless a new trial were to be the only remedy. It follows that the first sentence of Rule 50(b) applies not only in those cases where the verdict was returned independently, but also in those cases where the verdict was directed. To conclude to the contrary would be to say that the Rule settled only half of the constitutional questions raised by *Slocum*. Moreover, this conclusion is fortified by the broad sweep of the language of the first sentence of Rule 50(b):

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted . . ."

The language is unqualified and applies to any case in which a motion for a directed verdict has been denied or for any reason not granted. It is of no importance in bringing the rule into play that the other party's motion may have been granted.

Even were respondents correct, however, in their view that Rule 50(b) automatically reserves the legal questions raised by a motion for a directed verdict only in those cases in which the issues are submitted to the jury for its independent action, it does not follow that the requirements of the balance of the Rule with respect to appropriate post-verdict motions have no applicability to directed verdict cases. Rule 50(b) has more than one purpose. As was pointed out in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 250 (1940):

> "Rule 50(b) merely renders unnecessary a request for reservation of the question of law . . a formal res-

ervation; and, in addition, regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct."

The *Cone* case elaborated upon this second purpose of the Rule.

If, as the Circuit Court of Appeals held and respondents contend, Rule 50(b) is without application where the plaintiff's motion for a directed verdict was granted and the defendant's motion denied, the result is ludicrous. The defendants either would have no means of obtaining judgment despite error in directing the verdict for the plaintiff, or the time and manner of moving for judgment in this one class of cases would be unregulated by the Federal Rules. The possibility of any such anomalous result has never been suggested either by the Advisory Committee or any of the commentators upon the Federal Rules. Moreover, the requirement of Rule 50(b) that a motion for judgment in accordance with a prior motion for a directed verdict must be made before a Circuit Court of Appeals has authority to do what was done here applies in terms to the defendants. The motion must be made within ten days after the reception of a verdict, or the discharge of a jury if no verdict is returned. Here, there is no question but that a verdict was both returned and received (R. 203-204).

As a matter of fact, by virtue of the failure of the defendants to move for judgment, the Circuit Court of Appeals was required to adopt the novel and unpermissible procedure of directing the trial court to grant the defendants' motion for a directed verdict despite the fact that the jury had been discharged. The respondents defend this upon the grounds that the rendition of a directed verdict by a federal jury is a mere formality and that, in any event, the trial court could impanel a jury for the purpose of

rendering a verdict. (Resp. Br. 17-19) Both suggestions have long since been repudiated by this Court, as has been the procedure followed by the Circuit Court of Appeals.[4]

Certiorari should be granted to resolve the conflict with the *Cone* case, to establish that Rule 50(b) does regulate the time and manner of making motions for judgment even in cases where the other party's motion for a directed verdict has been granted, and to review the novel procedure employed by the Circuit Court of Appeals of directing a District Court to direct a verdict after the jury has been discharged. As the decisions referred to herein disclose, this Court has regularly granted certiorari to review the action of the Circuit Courts of Appeals in finally terminating litigation in jury cases.

---

[4] This Court has consistently held that the participation of a jury is essential even in a directed verdict case. In *Barney* v. *Schmeider*, 9 Wall. 248 (1869) this Court held that even though it might have been appropriate to have instructed a verdict for the plaintiff due to the insufficiency of the evidence, it was error so to do without first submitting the evidence to the jury. The trial court had reached his decision from a reading of the evidence himself without having it read to the jury. This disposes of respondents' suggestion that it would be permissible simply to impanel a jury for the purpose of returning a directed verdict. In *Hodges* v. *Easton*, 106 U. S. 408, 412 (1882), referred to in the petition for certiorari, the Court stated that even though a directed verdict would have been permissible, it would still have been necessary for the jury to make its verdict, albeit in conformity with the order of the court. This disposes of the procedure adopted by the Circuit Court of Appeals here.

Respondents cite an Illinois case. To dispose of it, it is sufficient to refer to *Schofield, New Trials and the Seventh Amendment*, 8 Ill. L. Rev., 286, 290 (1913) where the author said "trial by jury in common-law cases according to the rules of the common law of the Seventh Amendment does not exist in Illinois, and probably does not exist anywhere in the United States, except in the federal courts."

II.

The instruction to the District Court to grant the defendants' motion for a directed verdict was based upon grounds not specified in defendants' motion. This presents an important federal question as to the proper interpretation of Rule 50 of the Federal Rules, which has not been, but should be, decided by this Court, and in addition, decides a constitutional question in a way probably in conflict with applicable decisions of this Court.

In the petition for certiorari, we pointed out that the Circuit Court of Appeals had rested its decision upon grounds not specified in defendants' motion for an instructed verdict contrary to the requirements of Rule 50; that this decision was in conflict with the decisions of other Circuit Courts of Appeals; and that, in addition, by directing the entry of judgment upon grounds not raised by the motion for a directed verdict, and hence, not automatically reserved for later determination under Rule 50(b), the decision was in conflict with those of this Court in *Sloeum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1913), and *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389 (1937).

Although conceding that such grounds were not specified in their motion for an instructed verdict, the respondents urge that that motion should be read in the light of their having brought these grounds to the attention of the trial court at earlier stages of the proceedings. It is unnecessary to consider whether a motion for an instructed verdict should be so read since at no time were the grounds upon which the Circuit Court of Appeals disposed of this case ever brought to the attention of the trial court. Each of respondents' record citations (Resp. Br. pp. 26-29) may be examined in vain for any contention on the part of the respondents before the trial court that the plaintiff had alleged and failed to prove an express warranty (the ground upon which the Circuit Court of Appeals rested its reversal

and direction that judgment be entered), or that there was a failure of proof on the part of the plaintiff of an essential element of an implied warranty (the ground upon which the Circuit Court of Appeals denied the petition for rehearing).

The case was tried below upon the plaintiff's assertion that the defendants had acted as principals in the transaction or as agents of an undisclosed principal, and hence were liable as principals under the Illinois law (R. 2-5, 53, 121, 131-132), while the defendants asserted that they had acted as agents of a disclosed principal or that they had been orally exonerated from liability as agents (R. 12-14, 59, 202, 205-6). Throughout, it was assumed by both parties and the court that a warranty existed and that the primary question was whether the liability was that of the defendants or of the shipper in Mexico. Indeed, the respondents' motion for an instructed verdict assumes the existence of a warranty and asserts merely that the adulteration had not been sufficient to authorize the plaintiff to reject the entire shipment (R. 202).

Also, their motion for a new trial asserted that "contested questions of fact were presented by the evidence of both the plaintiff and the defendants" with respect to the questions of agency and sufficiency of the breach. (R. 205-206)

The portions of the record referred to by respondents (Resp. Br. pp. 26-29) show merely that the respondents asserted that they were acting as agents or brokers, and accordingly, that the liability and responsibility for the shipment were those of the Mexican shipper. There is a substantial difference between asserting that one is not liable as an agent and asserting that there is no warranty. Under the first, at least the principal would remain liable.

Under the second, the buyer would have no recourse against anyone.

Respondents' brief freely uses the term "disclaimer of warranty". The record and the arguments before the trial court may be searched in vain for the use of any such term. As we have said, respondents were seeking simply to exonerate themselves as agents. But even if the record were now read as though the defendants had raised the issue of disclaimer of implied warranty in the trial court, such a reading can provide them with no comfort. There is again a substantial difference between asserting that an implied warranty has been disclaimed and asserting that the essentials creating an implied warranty do not exist. *Cf.* Section 15(2) of the Illinois (Uniform) Sales Act with Section 71 of that Act. (Ill. Rev. Stats. c. 121½ §§ 15(2), 71). The Circuit Court of Appeals rested its denial of rehearing upon this last ground (R. 258).

Resting as it does upon grounds not specified in the motion for an instructed verdict, the order of the Circuit Court of Appeals that verdict be directed and judgment entered for the defendants, conflicts both with Rule 50 and with the decisions of the other Circuit Courts of Appeals that have considered the question. *Virginia-Carolina Tie & Wood Co.* v. *Dunbar,* 106 F. (2d) 383 (C.C.A. 4th, 1939); *Atlantic Greyhound Corporation* v. *McDonald,* 125 F. (2d) 849 (C.C.A. 4th, 1942); *Ryan Distributing Corp.* v. *Caley,* 147 F. (2d) 138 (C.C.A. 3rd, 1945) *cert. den.* 325 U. S. 859 (1945).

In addition, the grounds of decision not having been raised by the motion for an instructed verdict, and hence, not automatically reserved for later determination under Rule 50(b), the action of the Circuit Court of Appeals in directing the entry of judgment for the defendants deprived

the plaintiff of the right to a trial by jury under the Seventh Amendment. *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1913); *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389 (1937) and discussion *supra*, pp. 5-8.

III.

The refusal by the Circuit Court of Appeals to consider testimony admitted in evidence and a part of the record on appeal constitutes such a clear departure from the accepted and usual course of judicial proceedings as to require the exercise of this Court's power of supervision to prevent a gross miscarriage of justice.

The Circuit Court of Appeals rested its opinion denying rehearing upon its conclusion that evidence relied upon by the plaintiff as proving the second and last essential element of an implied warranty had not been introduced into the record (R. 258). The Circuit Court of Appeals did not question the efficacy of such proof but stated merely that "the trouble with this evidence is that it is not in the record and was kept out on the objection of the plaintiff. No part of the deposition was ever read or considered as read in evidence" (R. 258). The petition for certiorari (pp. 17-21) showed conclusively that the proof had been admitted into evidence and that the Circuit Court of Appeals had fallen into error in refusing to consider it. Respondents expressly concede that the proof which the Circuit Court of Appeals refused to consider was in fact introduced into evidence. They also concede that the Circuit Court of Appeals was mistaken in stating that the entire deposition of Todes was excluded by the trial court. (Resp. Br. pp. 23, 25)

It is impossible to read the opinion of the Circuit Court of Appeals in denying rehearing without concluding that had the Circuit Court of Appeals considered that evidence, it would have reached a different result. Its refusal to con-

sider such evidence constituted a clear departure from the accepted and usual course of judicial proceedings, which worked a gross injustice to petitioner, particularly in view of the denial to petitioner of a new trial and the direction that a final judgment be entered in favor of the respondents.

Conclusion

For the reasons heretofore given, a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit should be allowed.

Respectfully submitted.

BEN W. HEINEMAN
JOSEPH D. BLOCK
Attorneys for Petitioner

SWIREN HEINEMAN & ANTONOW
Suite 1406
135 South LaSalle Street
Chicago 3, Illinois
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 205

GLOBE LIQUOR COMPANY, INC., A CORPORATION,

Petitioner,

v.

FRANK SAN ROMAN and DOROTHEA SAN ROMAN, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF INTERNATIONAL INDUSTRIES,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

PETITIONER'S BRIEF

BEN W. HEINEMAN,
JOSEPH D. BLOCK,
Attorneys for Petitioner.

SWIREN HEINEMAN & ANTONOW
Suite 1406
135 South LaSalle Street
Chicago 3, Illinois
Of Counsel

LINCOLN PRINTING COMPANY, CHICAGO—WABASH 4904

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 205

GLOBE LIQUOR COMPANY, INC., A CORPORATION,

Petitioner,

v.

FRANK SAN ROMAN and DOROTHEA SAN ROMAN, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF INTERNATIONAL INDUSTRIES,

Respondents.

PETITIONER'S BRIEF

OPINIONS BELOW

The District Court did not prepare or publish an opinion. The opinion of the Circuit Court of Appeals and its opinion on petition for rehearing (R. 230, 257) are reported at 160 F. (2d) 800.

JURISDICTION

This Court's jurisdiction is invoked pursuant to the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, amending and reenacting Section 240(a) of the Judicial Code, 28

U.S.C.A. §347. A petition for certiorari was filed on July 11, 1947, and granted on October 13, 1947.

STATEMENT OF THE CASE

On March 16, 1944, the petitioner, Globe Liquor Company, Inc., the plaintiff below ("Globe"), placed an order for 750 cases of Mariachi Tequila (Gold) at a price of $10.50 per case, C.I.F. Laredo, Texas (Pl. Ex. 1, R. 178, 63). The order was taken by one Gabriel Todes, a liquor salesman representing the respondents ("International"). The order was written in longhand by Mr. Morton Lazarus, Vice President of Globe, as dictated to him by Todes (R. 100). By exchange of letters, the price of $10.50 per case specified in the original order was increased to $10.75 per case (Pl. Exs. 2, 3, R. 179, 65, 66). The letters incorporated by reference the terms of an irrevocable letter of credit which International required Globe to procure in accordance with a form provided by International's salesman (R. 98, Pl. Exs. 2, 3, R. 179, 65, 66).

Globe obtained from the Chase National Bank of the City of New York an irrevocable commercial letter of credit dated March 29, 1944, in favor of International in the amount of $8,062.50, the total purchase price. The letter of credit was detailed in its terms and required that drafts drawn thereunder be accompanied by "Mexican Shippers' Commercial Invoice in triplicate, showing '750 cases of Tequila (Gold color) at $10.75 per case, CIF Laredo, Texas', Consular invoice in duplicate, Insurance certificate, Original bill of lading issued to order of Mexican Shipper blank endorsed evidencing shipment of 750 cases of Tequila to Laredo, Texas." The letter of credit did not specify any particular "Mexican Shipper" and was assignable (Pl. Ex. 4, R. 180, 67). International accepted the letter of credit with minor formal changes on April 1, 1944 (Pl.

Exs. 5, 6, 7, R. 182-184, 80). Although contending that they were merely agents of the Mexican shipper, International has conceded that the identity of the shipper was not disclosed to Globe until May 10, 1944 (R. 135). This was six weeks after the completion of the contract and International's acceptance of the irrevocable letter of credit.

The tequila was shipped to the United States in bond on May 22, 1944 (Def. Ex. 7, R. 195, 170). A draft drawn under the irrevocable letter of credit for the full amount of the purchase price was paid by Globe (R. 92). On July 11, 1944, the shipment was inspected by representatives of the Food and Drug Administration of the Federal Security Agency and detained upon the ground that it was adulterated as containing "a foreign substance dangerous to health—glass particles" (Pl. Exs. 8, 9, R. 185-186, 87). The Chief of the Philadelphia Station of the Food and Drug Administration gave an affidavit stating in detail the procedures followed in the inspection and further stating that the procedures were those customarily followed by the Philadelphia Station under similar circumstances and were adequate to demonstrate that the shipment of Tequila was adulterated in the manner stated (Pl. Ex. 10, R. 187, 90).[1]

Globe's lot of 750 cases of tequila was combined in the same railroad car with another lot of 750 cases of the same product from the same source destined for another of International's customers in Baltimore. That lot was inspected by the United States Food and Drug Administration in Baltimore and was likewise detained upon the ground that it was adulterated with sharp splinters of glass (R. 108,

[1] It was stipulated that the affidavit should be given the same effect as if the witness had appeared and testified. International's objections to the admissibility of the affidavit on other grounds were overruled (R. 89-90).

114-115).[2] The shipment was continuously detained by the United States and Globe never received the merchandise (R. 92).

It was stipulated that the costs and expenses incurred and actually paid by Globe in connection with the shipment amounted to $9,704.25 (R. 93-94). It was further stipulated that Globe made a timely demand upon International for repayment (R. 94).

On January 29, 1945, Globe instituted suit in the District Court of the United States for the Northern District of Illinois, Eastern Division, sitting in Chicago (R. 2). The case was tried before a jury. It was Globe's theory that International had acted as principals in the transaction or as agents of an unidentified principal, and, hence, were liable as principals under Illinois law (R. 2-5, 53, 121, 131-132), while the defendants asserted that they had acted as agents of a disclosed principal or that they had been orally exonerated from liability as agents (R. 12-14, 59, 202, 205-206). Throughout it was assumed by both parties and the court that a warranty existed and that the primary question was whether the liability was that of International or of the shipper in Mexico (R. 59, 136).

At the conclusion of all of the evidence, International filed a written motion for an instructed verdict upon the grounds, *first*, that they were not principals in the transaction but had acted merely as the agents of a disclosed principal in Mexico and *second*, that the evidence that a portion of the shipment of the tequila was adulterated was insufficient to justify Globe's rejection of the entire shipment (R. 202). This motion was denied and Globe's motion for

[2] The facts with respect to the second shipment destined for a customer other than Globe were admitted into evidence over International's objection solely to show that the sampling procedure followed by the United States was fair and adequate (R. 113).

a directed verdict was granted (R. 176, 177). Pursuant to the court's direction, the jury's verdict was returned and received (R. 176-177, 203). Judgment was entered upon the verdict in the stipulated amount (R. 203-204).

International made no motion under Rule 50(b) of the Federal Rules of Civil Procedure to have judgment entered in accordance with their motion for a directed verdict. Their motion for a new trial was denied (R. 209).

International thereupon appealed to the United States Circuit Court of Appeals for the Seventh Circuit. On February 14, 1947, the Circuit Court of Appeals rendered its decision determining that the complaint alleged and that Globe had relied upon an express warranty, that there was no evidence of an express warranty, and that the trial court accordingly had erred not only in directing a verdict for Globe, but in failing to direct a verdict for International. The judgment of the District Court was reversed with instructions to grant International's motion for a directed verdict and enter judgment thereon (R. 230-232).

On April 14, 1947, the Circuit Court of Appeals denied Globe's petition for rehearing with a written opinion (R. 257). The court conceded that if evidence had been admitted which established an implied warranty under the Illinois Uniform Sales Act, even though the complaint had alleged merely an express warranty, the complaint would be considered as amended to conform to such evidence. Under that Act, an implied warranty is established (a) if the goods were bought by description, and (b) if the sellers were dealers in goods of that description. The court further stated that the goods had been sold by description (R. 258). However, with respect to the second essential element of an implied warranty, the court mistakenly stated that the evidence relied upon by Globe to show that International were

dealers had been kept out of the record on Globe's objection, and, hence, that Globe could not claim the benefit of evidence that it had had excluded (R. 258).[3]

As to its authority finally to dispose of the case in the manner in which it did, the Circuit Court of Appeals took the position that Rule 50(b) was not applicable to a case in which the trial court directed a verdict, and stated that this Court's decision in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947) should not affect that ruling (R. 260).

Globe immediately moved for leave to file its second petition for rehearing (R. 261) for the purpose of showing that the evidence which the Circuit Court of Appeals had refused to consider was in fact admitted into evidence and included in the record and therefore should serve as the basis for treating the complaint as amended under Rule 15(b). International also filed a motion for a modification of so much of the language in the court's opinion upon rehearing as stated that no part of the deposition of Todes (which contained the evidence relied upon by Globe to establish that International were dealers) was ever read or considered as read in evidence (R. 262-263, 266). By their respective motions, both Globe and International asserted that the court had misread the record. The Circuit Court of Appeals (by Judge Minton acting alone) denied both motions (R. 267).

Globe next filed its motion, pursuant to Rule 75(h) of the Federal Rules, to remit the record to the trial court for the purpose of having the trial judge certify whether the evi-

[3] The evidence relied upon by Globe to show that International were dealers was the testimony of International's witness and salesman, Todes, to the effect that he had "made quite a number of sales" of the tequila for International and that he had "sold thousands of cases of the tequila" (R. 20-21).

dence in question had in fact been admitted. The court (Judge Minton again acting alone) also denied this motion (R: 268-271).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In refusing to consider testimony admitted into evidence and a part of the record on appeal, and, upon a consideration of such testimony, in failing to affirm the judgment of the District Court.

2. If the record is ambiguous as to the admission into evidence of the testimony in question, in refusing to remit the record to the District Judge, pursuant to Rule 75(h), for his certificate as to whether the testimony had in fact been admitted.

3. In remanding the proceedings with instructions to grant International's motion for a directed verdict and to enter judgment thereon, in the absence of a motion by International pursuant to Rule 50(b), for judgment in accordance with their motion for a directed verdict.

4. In remanding with instructions to the District Court to grant International's motion for a directed verdict and enter judgment thereon upon grounds not specified in International's motion for a directed verdict as required by Rule 50(a).

5. In remanding with instructions to the District Court to grant International's motion for a directed verdict and enter judgment thereon, since, under the circumstances, this disposition of the case was arbitrary, capricious and constituted an abuse of discretion.

SUMMARY OF ARGUMENT

I.

The Circuit Court of Appeals refused to treat the complaint as amended pursuant to Rule 15(b) of the Federal Rules to allege an implied warranty on the erroneous ground that testimony establishing one of the essential elements of such a warranty had not been admitted into evidence. The record clearly discloses the contrary to be the case. Even if, however, the record were ambiguous with respect to the District Court's rulings (which it is not) the Circuit Court of Appeals erred in refusing to remit the record to the District Court, pursuant to Rule 75(h), for the purpose of obtaining the certificate of the District Judge as to whether or not the testimony relied upon had been admitted into evidence.

II.

A. The Circuit Court of Appeals erred in reversing the judgment of the trial court. The evidence admitted into the record conclusively established the existence of an agreement for the sale of the tequila to Globe, the buyer, by International, either as principals or as agents of an unidentified principal; the existence of an implied warranty of merchantable quality; the breach by International of the implied warranty; and the damages suffered by Globe. There is no conflicting evidence or evidence sufficient to support a verdict in favor of International.

B. The trial court properly excluded certain evidence offered on behalf of International.

(1) The trial court properly excluded, as violative of the parol evidence rule, evidence offered by International for the purpose of showing either that International were agents or that they were exonerated from liability. The parol evidence rule is a rule of substantive law and the law of Illinois controls.

(2) The trial court properly excluded evidence offered by International showing that the identity of International's alleged principal in Mexico was made known to Globe subsequent to Globe's incurring liability or becoming firmly bound. Under Illinois law, such a disclosure came too late to relieve International of their liability as agents of an unidentified principal.

(3) In the Circuit Court of Appeals, International asserted for the first time that the evidence offered to establish an oral agreement exonerating them from liability as agents also established a valid disclaimer of warranty. The evidence was properly excluded by the District Court as violative of the parol evidence rule. In any event, however, the offered evidence was insufficient as a matter of law to establish the express agreement required by Section 71 of the Illinois Uniform Sales Act to negative an implied warranty.

III.

International having made no post-verdict motion for judgment in accordance with its motion for a directed verdict, pursuant to Rule 50(b), the Circuit Court of Appeals was without power to remand with instructions that the District Court grant International's motion for a directed verdict and enter judgment thereon. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947). This case is precisely like the *Cone* case except that here the jury returned its verdict at the direction of the District Court rather than as its own independent action. This factual distinction does not warrant a different result.

A. The express language of Rule 50(b), and its purpose as announced in the *Cone* case, made clear that the requirement of a post-verdict motion for judgment is applicable in all jury cases.

B. The Circuit Court of Appeals, however, held that the sole purpose of Rule 50(b) was to avoid the constitutional

difficulties considered in *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1913), and that since these difficulties did not exist in directed verdict cases, the Rule was inapplicable in such cases. This view fails to recognize that the avoidance of constitutional difficulties was but one of the Rule's two purposes. Moreover, it is historically inaccurate. This Court, in *Slocum*, made clear that it viewed those constitutional issues as being present in directed verdict as well as independent verdict cases.

IV.

The Circuit Court of Appeals rested its judgment that International's motion for a directed verdict should be granted, and that Globe's petition for rehearing should be denied upon grounds not specified in International's motion. This is contrary to the express command of Rule 50(a) and to the policy of Rule 50 as a whole which require the grounds in support of a motion for a directed verdict to be fully displayed in order to give both the trial court and the other party full and repeated opportunity for their mature consideration and correction if necessary.

Moreover, in applying Rule 50 in such a manner, the Circuit Court of Appeals revived substantial questions that were intended to be put at rest forever by the Federal Rules. *Slocum* v. *New York Life Insurance Co.*, *supra*; *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654 (1935). The first sentence of Rule 50(b) reserves for later determination only the legal questions specified in the motion for a directed verdict. Since the decision of the Circuit Court of Appeals was predicated upon grounds not specified in International's motion for a directed verdict, and hence not reserved for later determination; it follows that the decision of the Circuit Court of Appeals is in direct conflict with the principles of *Slocum*.

V.

Even assuming *arguendo* that the Circuit Court of Appeals was correct in concluding that the testimony relied upon had not been admitted into evidence, it was plainly available and at hand. Moreover, the alleged deficiency in the proof had not been raised by International at any time in the trial stage of the proceedings. Under such circumstances, and wholly apart from the Court's power, it was arbitrary, capricious and an abuse of discretion for the Circuit Court of Appeals to reverse with instructions finally to terminate the litigation, rather than to remand for a new trial.

ARGUMENT

I.

The refusal of the Circuit Court of Appeals to consider testimony admitted into evidence, and its consequent failure to treat the complaint as amended to conform to that evidence, constitute prejudicial error.

In its original opinion, the Circuit Court of Appeals reversed the judgment of the District Court upon the ground that the complaint alleged, but the plaintiff had failed to prove, an express warranty (R. 231). On denial of the petition for rehearing, the court held that where evidence had been admitted which proved a case different from that alleged in the complaint, the pleadings may be treated as amended to conform to that evidence pursuant to Rule 15(b).[5] However, the court refused to treat the complaint

[5] Rule 15(b) of the Federal Rules of Civil Procedure provides in part as follows:

> "(b) *Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues."

as amended to allege an implied warranty on the erroneous ground that testimony establishing one of the essential elements of such a warranty (that the defendants were dealers) had not been admitted into evidence (R. 257-258).[6]

The evidence in question was contained in the deposition of Gabriel Todes, a salesman employed by the defendants, and is as follows (R. 20-21):

"Q. When did you first start selling merchandise as salesman for International Industries?

A. In January, 1944.

Q. You made some sales, did you?

A. I made quite a number of sales.

Q. What commodity did you sell?

A. I sold Tequila.

Q. Mexican Tequila?

A. Mexican Tequila.

Q. What other commodity?

A. Gin. That came from Argentine, and some of it came from Mexico. I sold thousands of cases of the Tequila." (Underscoring supplied)

During the trial, this deposition, which had been taken in behalf of International, was duly opened in open court (R. 143) and was presented to the trial judge out of the

[6] In International's brief in opposition to the petition for writ of certiorari, they concede "for the purpose of considering this petition for certiorari" that the testimony relied upon by Globe was introduced in evidence (Br. p. 25). Uncertainty as to the intended scope of respondents' concession, a recollection that respondents' counsel refused to join in advising the Circuit Court of Appeals that it had erred, and the importance of the issue all combine to require a full presentation of the matter here.

presence of the jury for the purpose of obtaining his rulings on Globe's objections to certain portions thereof.[7] In the course of presenting the deposition to the trial court, certain of Globe's objections were sustained and certain others were overruled. The record shows that the first objection made by Globe was to a question appearing on page 6 of the deposition. The first question objected to by Globe's attorney was as follows:

> "Q. What were his oral instructions to you relative to the taking of orders or selling of merchandise in his behalf?" (R. 144)

An examination of the deposition shows that the evidence relied upon by Globe and quoted above immediately preceded the question to which Globe's first objection was made (R. 21).

At the conclusion of the trial, International's counsel noticed that he had inadvertently failed to make a formal offer into evidence of those portions of the deposition to which objections had not been sustained. He then sought and obtained the consent of Globe's counsel and the ruling of the trial court to the effect that such portions would be considered as though they had been introduced into evidence. The record discloses that the following transpired (R. 177):

> "By Mr. Kahn: I just called Mr. Heineman's attention that I assume from our comment as we went along on the Todes deposition that what went out will stay out, it will simply be offered as an offer of proof, and the few fragments that were left in will be considered as introduced in the record. I did not take the time or the trouble to read those in.

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[7] It is appropriate here to explain the organization of the printed record. The deposition was filed with the Clerk in advance of trial and is set out in its entirety in the record at pages 19-49, as filed at that time. The proceedings in open court with respect to the deposition appear at pages 143-160.

By the Court: They were not introduced.

By Mr. Kahn: I know they were not and that is why Mr. Heineman is now consenting to let me put them in.

By Mr. Heineman: He inadvertently omitted it and I am reluctant frankly to take advantage of an omission by counsel which I know is inadvertent.

By the Court: You are agreeing that those fragments to which objections were not sustained may go in?

By Mr. Heineman: I am agreeing that they may go in.

By the Court: That only had to do with the direct testimony.

By Mr. Heineman: That is correct.

By the Court: Very well" (R. 177-178).

It was in the face of this that the Circuit Court of Appeals stated that "No part of the deposition was ever read or considered as read in evidence. No part of the deposition was ever admitted" (R. 258).[8]

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[8] The clarity of the record quoted above with respect to the admission of the evidence relied upon by the plaintiff strongly suggests that the court failed to read that portion of the record, although it was twice expressly brought to its attention (R. 243-244, 261). However, even assuming that the record is ambiguous as to the scope of the trial court's ruling on the admission of the evidence relied upon, the Circuit Court of Appeals erred in denying plaintiff's motion under Rule 75(h) of the Federal Rules, for the remission of the record to the District Court for the purpose of having the trial judge certify whether or not the testimony had in fact been admitted into evidence (R. 268-71). If the record can be said to be susceptible to a legitimate difference of opinion, the resolution of that difference is peculiarly a matter within the province of the trial judge. Rule 75(h) was designed for such a situation. It provides in part as follows:

> "(h). *Power of Court to Correct Record.* It is not necessary for the record on appeal to be approved by the district court or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth."

If ambiguous, the refusal to remit the record to the District Court conflicts with the decision and practice of the Circuit Court of Appeals for the Eighth Circuit as announced in *Beck* v. *Federal Land Bank of Houston*, 146 F. (2d) 623 (C.C.A. 8th, 1945) and probably with that of the Court of Appeals for the District of Columbia. *Cf. Reynolds* v. *Imlay*, 118 F. (2d) 53 (App. D. C. 1941).

Even counsel for the defendants was quick to suggest to the Circuit Court of Appeals that it had erred in so concluding (R. 262, 266). The defendants pointed out to the court that certain portions of the deposition upon which *they* relied had in fact been admitted into evidence, but denied the admission of the first six pages of the deposition (R. 19-21) upon which the plaintiff relied. Defendants requested the Circuit Court of Appeals to modify its conclusion that no part of the deposition had been admitted (R. 262-264, 266). Defendants' position is patently inconsistent. Although they urge that certain later portions of the deposition were admitted pursuant to the agreement of counsel, they deny without basis that the first six pages of the deposition were admitted, although these pages contain such basic information as the witness' name, address, occupation and relationship to the defendants.

The agreement between counsel and the ruling thereon by the District Court make clear that all portions of the deposition to which objections were not sustained were admitted into evidence. No objection was made or sustained to the evidence relied upon by plaintiff. This testimony was accordingly admitted in evidence and was available to the Circuit Court of Appeals for its consideration.

It follows that the complaint should be treated as amended to conform to that evidence so as to allege the existence of an implied warranty pursuant to Section 15(2) of the Illinois Uniform Sales Act. We think a reading of the opinion of the Circuit Court of Appeals on rehearing requires the conclusion that it would have so treated the complaint had it felt free to consider the evidence (R. 258).

II.

All of the essential elements of liability being established without contradiction by the record evidence, and there being no prejudicial error in the trial court's exclusionary rulings, the judgment of the District Court should be affirmed.

The Circuit Court of Appeals reached no conclusion on the merits. The petition for certiorari preserved the question of whether or not the judgment of the District Court should be affirmed, and accordingly, the merits of the litigation are properly before this Court for determination (Petition for Certiorari, pp. 7-8).

The evidence admitted into the record established as a matter of law the existence of a written integrated contract for the sale of the tequila between Globe, as buyer, and International, as principals and sellers; the existence of an implied warranty of merchantable quality; its breach by International; and the damages sustained by Globe. With respect to the defenses asserted by International, no evidence sufficient to sustain a verdict in its favor was received. The exclusionary rulings of the District Court were required by the substantive law of Illinois. Each of these questions will be discussed separately.

A. The record evidence established as a matter of law the essential elements of International's liability to Globe.

Globe agreed to buy and International agreed to sell to Globe, 750 cases of Mariachi Tequila Gold at a price of $10.75 per case. The contract consisted of a written order given to Todes, International's salesman, and an exchange of confirming letters between Globe and Todes which incorporated by reference the terms of an irrevocable letter of credit which Globe caused to be issued to International at their request and in the terms required by them (Pl. Exs. 1-4, R. 178-181, 63-67, 98).

Section 15(2) of the Illinois Uniform Sales Act creates an implied warranty of merchantable quality (a) if the goods are bought by description and (b) if the sellers are dealers in goods of that description.[9] The goods were bought not by inspection or sample, but by description as Mariachi Tequila (Gold) (Pl. Exs. 1-4, R. 178-181, 63-67). This constitutes a purchase by description within the meaning of the Illinois Uniform Sales Act and the Circuit Court of Appeals so held (R. 258).

The defendants argued in the Circuit Court of Appeals that a purchase by trade name does not constitute such a purchase by description as to give rise to the implied warranty of Section 15(2). This view is contrary to the uniform settled construction of that section of the Uniform Sales Act. A leading case is *Ryan* v. *Progressive Grocery Stores*, 255 N. Y. 388, 175 N. E. 105 (1931) where the Court of Appeals, speaking through Cardozo, C. J., held the implied warranty of Section 15(2) to apply to the purchase of "Ward's Bread." See also *Annotation*, 135 A. L. R. 1393 (1941); 55 *Corpus Juris (Sales)* §724, p. 759.

International also argued below that if the purchase is under a trade name, then Section 15(4) of the Uniform Sales Act prohibits the raising of the implied warranty under Section 15(2). Here again the construction of these provisions of the Uniform Sales Act to the contrary is

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[9] Section 15(2) of the Illinois Uniform Sales Act (Ill. Rev. Stats. (1947) c. 121½, §15(2)) provides as follows:

> "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be of merchantable quality."

The parties and the Circuit Court of Appeals agreed that the law of Illinois is applicable (R. 258).

settled and uniform.[10] *Giant Mfg. Co.* v. *Yates-American Mach. Co.*, 111 F. (2d) 360, 365 (C.C.A. 8th 1940); *D'Onofrio v. First National Stores, Inc.*, 68 R. I. 144, 26 A (2d) 758 (1942); *Botti* v. *Venice Grocery Co.*, 309 Mass. 450, 35 N. E. (2d) 491 (1941); *Sperry Flour Co.* v. *DeMoss*, 141 Ore. 440, 18 P. (2d) 242 (1933); *Kelvinator Sales Corp. v. Quabbin Improvement Co., Inc.*, 254 N. Y. S. 123, 125 (App. Div. 1931); *Dow Drug Co.* v. *Nieman*, 57 Ohio App. 190, 13 N. E. (2d) 130 (1936).

In the Circuit Court of Appeals, International relied upon two Illinois cases, *Beckett* v. *F. W. Woolworth Co.*, 376 Ill. 470 (1941), and *Santa Rosa-Vallejo Tanning Company* v. *Kronauer & Company*, 228 Ill. App. 236 (1923), as showing that in Illinois, at least, a purchase under a trade name negatives the warranty of merchantable quality implied by Section 15(2). The *Beckett* case involved only an alleged express warranty which the court found did not exist. The court also stated that the sale was by a trade name and that, hence, Section 15(4) applied, but did not rule or indicate whether that fact precluded the application of Section 15(2). The question was neither raised nor argued by the plaintiff.

The *Santa Rosa-Vallejo* case is also plainly distinguishable. The court made clear that the only warranty involved was that of fitness for a special purpose; hence, whatever it said with respect to the effect of Section 15(4) upon the

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[10] Section 15(4) of the Illinois Uniform Sales Act is as follows:

"(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

The implied warranty of "fitness for any particular purpose" is raised by Section 15(1) of the Sales Act. This is entirely different from, and Section 15(4) has no application to, the implied warranty of merchantable quality raised by Section 15(2) and the cases cited in the text so hold.

implied warranty of merchantable quality created by Section 15(2) is dictum and in no way controlling upon the federal courts.[11]

We conclude, therefore, that the Illinois courts have not passed upon the question of whether a sale under a trade name is a sale by description within the meaning of Section 15(2). When the question is presented, the Illinois courts will be required by Section 74 of the Illinois Uniform Sales Act to follow the settled construction given to the Act by the courts of other states. Ill. Rev. Stats. (1947) c. 121½, §74; *The Sherer-Gillett Company* v. *Long*, 318 Ill. 432 (1925). The Circuit Court of Appeals was, therefore, plainly right in holding that the tequila was sold to Globe by description within the meaning of Section 15(2).

Also, the testimony introduced by the defendants unmistakably establishes that they were in fact dealers in tequila within the meaning of Section 15(2). This testimony was that of International's salesman, Todes. It showed that he "made quite a number of sales" of tequila for the defendants, and that he "sold thousands of cases of the tequila." The fact that the evidence also showed that Todes had been acting as International's salesman for several months prior to making the sale to Globe is additional proof of the

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[11] Even if the *Santa Rosa-Vallejo* case be regarded as passing upon this question, *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938) does not require that it be followed by the federal courts. Under the then prevailing Illinois statute, decisions of the Illinois Appellate Court had no "binding authority in any cause or proceeding other than in that in which they may be filed." Smith-Hurd Ill. Ann. Stats., c. 37, §41 (1935). Under identical circumstances, this Court in *Graham* v. *White-Phillips Co., Inc.*, 296 U. S. 27 (1935), held that by virtue of this statute, a decision of the Illinois Appellate Court construing the Illinois Negotiable Instruments Law was not binding upon the federal courts even though they were required to follow the local law.

defendants' status as dealers.[12] The court's opinion on petition for rehearing strongly suggests that had the court felt free to consider the evidence, it would have regarded the implied warranty to have been established as a matter of law (R. 258). In any event, that is the only proper conclusion, since no other or contradictory evidence was offered or admitted.

The record is equally conclusive with respect to the breach of the implied warranty. Due to the intervention of the United States Government, the tequila was never received by Globe. The defendants argued that the proof of adulteration was insufficient to warrant Globe's rejection of the entire shipment. The sample selected by the Food and Drug Administration showed approximately 10 percent of the shipment to be adulterated with glass particles (Pl. Exs. 8, 9, 10, R. 185-189, 87, 90). Moreover, a sample taken by a different station of the Food and Drug Administration from another shipment of the same tequila in the same car and from the same source but destined for a different customer showed approximately 15 percent of the shipment to be adulterated in the same manner (R. 108, 115). In view of the fact that the merchandise was a beverage which Globe was purchasing for resale, the District Court properly determined as a matter of law that the presence of glass particles in that proportion rendered the entire shipment unmerchantable and not the merchandise for which the plaintiff had contracted. It was accordingly held that the breach of warranty was so material as to entitle the plaintiff to sue for the entire purchase price.

For reasons to be discussed hereafter, the District Court excluded the bulk of the evidence offered by International

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[12] All of the above testimony is included in the evidence that the Circuit Court of Appeals improperly refused to consider (R. 258). We have heretofore shown that this testimony was in fact admitted into evidence. *Supra*, pp. 11-15.

to support the defenses urged in their amended answer. Defendants do rely, however, on certain testimony of their salesman, Todes, which was admitted into evidence and which purports to show that Lazarus, Globe's Vice-President, after the breach and while making a demand for the return of the purchase price, made the following statement to Todes:

> "I agree that the shipper is responsible for it. We want our money back. I am not saying that it is your fault but it is the shipper's fault." (R. 154, 32)

This is not an action in tort for negligence, but an action for breach of contract. There is no issue of fact in this case as to whether the defendants were responsible for the presence of glass particles in the bottles. It is conceded that the merchandise was shipped directly from Mexico and that the adulteration was not due to defendants' fault. But the issue is the defendants' liability under Illinois law, either as principals or as agents of an unidentified principal, for the breach of warranty. This testimony leaves that liability unaffected.

The record being devoid of evidence sufficient to support a verdict in favor of International, the Court was under a duty to instruct a verdict for Globe. *Pennsylvania R. R. Co.* v. *Chamberlain,* 228 U. S. 329, 343 (1933).

B. The District Court properly excluded certain evidence offered on behalf of the defendants.

The written contract between the parties was complete and unambiguous and made no disclosure either of the alleged fact that International were agents, or of the identity of their alleged principal. The defendants sought to introduce evidence at the trial seeking in the main to show, *first,* that prior to the making of the contract, their salesman had advised Globe that International were brokers

and not responsible for the shipment, and *second*, that the identity of the Mexican shipper and alleged principal was disclosed or communicated to Globe in apt time. These two general classes of evidence were properly excluded by the District Court for the reasons of substantive Illinois law hereafter to be considered.

(1) Evidence seeking to vary or contradict the terms of the contract between the plaintiff and defendants was properly excluded as violative of the parol evidence rule. The parol evidence rule is a rule of substantive law and the law of Illinois controls.

It is unchallenged that the parol evidence rule is a rule of substantive law and that the law of Illinois controls. *American Crystal Sugar Co.* v. *Nicholas*, 124 F. (2d) 477 (C.C.A. 10th, 1941); *Zell* v. *American Seating Co.*, 138 F. (2d) 641 (C.C.A. 2nd, 1943), *revd. on other grounds*, 322 U. S. 709 (1944); 9 *Wigmore, Evidence*, (3rd Ed. 1940) §2400; 3 *Beale, Conflict of Laws* (1935) §599.1; *Annotation*, 141 A. L. R. 1043 (1942).

At the trial the defendants offered the deposition of Gabriel Todes, their salesman, for the purpose of showing that the plaintiff had been orally advised at the time of the placing of the order that the defendants were brokers and not responsible for the shipment (R. 26). In anticipation of that offer, the District Court heard extended argument and discussion of the cases on parol evidence. Thereupon, the court ruled that the major portion of the testimony contained in the deposition was inadmissible in that it sought to vary or contradict the terms of a written contract (R. 143, 120-160).[13] The Circuit Court of Appeals erred in concluding that "no written definitive contract was

[13] Since this testimony was excluded, Globe did not offer any rebuttal evidence.

entered into by the parties covering the transaction" (R. 231).[14]

The contract between the parties consisted of the order and an exchange of letters which incorporated the terms of the irrevocable letter of credit by express reference thereto. The initial order called for a 60 day letter of credit (Pl. Ex. 1, R. 178, 63). This order was dictated by defendants' salesman (R. 100). The letter of March 24, 1944, from defendants' salesman to Globe directed Globe to "execute your letter of credit exactly in accordance with the form which I left you" with certain minor changes (Pl. Ex. 2, R. 179, 65). The confirming letter from Globe to defendants' salesman stated that "we have put through the letter of credit in accordance with the specimen you left here, but I changed to Tequila where you had the word Vodka" (Pl. Ex. 3, R. 179, 66). The terms of the irrevocable letter of credit so incorporated and made a part of the agreement were precise, unambiguous and detailed (Pl. Ex. 4, R. 180, 67).

The controlling Illinois authorities make clear that the District Court was correct in concluding that the written documents constituted a written contract not subject to variation or contradiction by parol evidence. *The Telluride Power Transmission Company* v. *The Crane Company*, 208 Ill. 219, 226 (1904); *Hypes* v. *Griffin*, 89 Ill. 134 (1878). In this last decision, the court cited with approval and quoted from *Nash* v. *Towne*, 5 Wall. 689 (1866), as follows:

> "Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed."

[14] The grounds upon which the Circuit Court of Appeals actually disposed of the case were not based in any way upon this conclusion.

There are no Illinois decisions to the contrary. The District Court's exclusion of this evidence was proper.

(2) The District Court properly excluded evidence offered by the defendants to show that the identity of the alleged principal was made known to Globe subsequent to its incurring liability or becoming firmly bound upon its contract.

Even if the District Court misapplied the parol evidence rule, the error was a harmless one. The admission into evidence of testimony allegedly establishing that the defendants were in fact agents would not have been sufficient to relieve them of liability upon the contract or to sustain a verdict in their favor.

The law is settled in Illinois as elsewhere that in the case of a partially disclosed principal, that is, where the fact of agency is known but the identity of the principal is unknown, the agent is liable as a principal upon his contracts with third persons. *Annes* v. *Carolan, Graham, Hoffman, Inc.*, 336 Ill. 542 (1929); *Wheeler* v. *Reed*, 36 Ill. 81, 91 (1864); *Scaling* v. *Knollin*, 94 Ill. App. 443 (1900); *American Appraisal Co.* v. *Pio*, 246 Ill. App. 467 (1927); *Trench* v. *Hardin County Canning Co.*, 67 Ill. App. 269 (1896), *aff'd.* 168 Ill. 135 (1897). The Illinois law, which is binding upon the federal courts in this case, reflects the well-considered views of the majority of the other courts. 2 *Restatement, Agency* (1933) §321, p. 712; 2 *Corpus Juris (Agency)*, §491, pp. 816, 817.

It is equally well established that the agent is not relieved of liability by the disclosure of the principal's identity subsequent to the third person's incurring liability or becoming bound upon his contract. The principle is well

stated in *Tiffany on Agency* (1924 Ed.), §99, where it is said (at page 73):

> "Thus the third person may successfully maintain suit against the agent of an undisclosed principal, and this right is not lost or diminished by a discovery of the existence or of the identity of the principal after the contract was made." (footnotes omitted).

3 *C.J.S. (Agency)* §216, states the rule as follows (at page 125):

> "A disclosure of the fact of agency and the identity of the principal made before or at the time the contract is entered into or before liabilities are incurred is sufficient to relieve the agent from personal liability. It is then that the disclosure to the other party must be made for a subsequent discovery or disclosure of the principal is ineffective to relieve the agent from liability." (footnotes omitted).

The order, exchange of letters and letter of credit constituting the agreement between the parties bore dates from March 16 to March 29, 1944 (Pl. Exs. 1-4, R. 178-181, 63-67). At the trial, International's counsel conceded that May 10, 1944, was the first date upon which the name of Gonzalo A. Larrea, the Mexican shipper and alleged principal, was disclosed to Globe (R. 135, Amended Answer, R. 12-13). It was also conceded that the identity of the alleged principal was withheld intentionally and for what the defendants believed to be sound commercial purposes.[16] The Dis-

[16] In his opening statement to the jury, counsel for International said:

> "Although at the time Mr. Todes did not state the name of the shipper, the reason is obvious. Because the demand for liquor was so strong in behalf of purchasers that had they known the name of the shipper, and his name and location they could have dealt directly with the shipper, and in that way would obviate and deprive my clients from the small commission they were to earn." (R. 55)

It is well settled that admissions by counsel in his opening statement are binding evidence of the facts admitted. *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 263 (1880); *Best* v. *District of Columbia*, 291 U. S. 411, 415 (1934).

trict Court properly excluded all evidence offered by the defendants to show the disclosure of the identity of their alleged principal since the evidence showed on its face that under Illinois law the disclosure came too late to affect the defendants' liability.[17]

At various times in the course of these proceedings, the defendants have relied upon the excluded testimony of Todes (R. 26) as establishing an express agreement either exonerating them from liability as agents or negativing the implied warranty.[18] As we have said, we believe that the trial court correctly determined that the testimony was inadmissible by virtue of the parol evidence rule.

In any event, however, the testimony could not possibly establish either of the two defenses now raised by the defendants.

The authorities make clear that in the case of an unidentified principal, there is a strong natural presumption against the existence of an agreement exonerating the agent from liability so as to leave the buyer with recourse only against an unknown principal. The authorities establish that such an agreement will not be inferred but that it must be mutually intended and that the third party's assent thereto must be clearly manifested. The comment of Section 321 of the *Restatement* is in part as follows:

> "The inference of an understanding that the agent is a party to the contract exists unless the agent gives

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[17] This evidence consisted of defendants' exhibits 4, 5, 6, 8, 9, and 10 (R. 192-198, 168-171).

[18] There is, of course, a substantial difference between these two defenses. If the defendants were merely exonerated from liability as agents, the alleged principal would, nevertheless, remain liable for breach of the implied warranty, whereas if the implied warranty were negatived, the buyer would have no recourse against anyone.

> such complete information concerning his principal's identity that he can be readily distinguished. If the other party has no reasonable means of ascertaining the principal, the inference is almost irresistible and prevails in the absence of an express agreement to the contrary." 2 *Restatement, Agency*, (1933) § 321, p. 712.

See also 1 *Williston, Contracts*, (Rev. Ed. 1936) § 285, where the following appears:

> "There can be no policy of the law forbidding a person who deals with an agent assenting to such a bargain, foolish though it may be, if he wishes to do so. But in the absence of clear expression to the contrary, it is a fair presumption that he does not wish to do so, and the law is clear that the mere fact that the agency, but not the principal, is disclosed will not free an agent from personal liability as a contractor."

Under detailed examination by defendants' counsel, Todes made clear that Globe's Vice-President said nothing when allegedly advised that the defendants would not be responsible.[19] Silence does not manifest the clear intention to enter into a foolish bargain which would warrant submitting that issue to a jury. Under analogous circumstances, the Supreme Court of Illinois has held that a contract between

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[19] The testimony of Mr. Todes is as follows (R. 48):

> "Q. During this March 16th, 1944 conversation with Mr. Lazarus, when you told him the International Industries would not be responsible for the shipment of the merchandise or the quality of the merchandise, what, if anything, did he say?
>
> A. Nothing.
>
> Q. He didn't object to that statement on your part?
>
> A. No.
>
> Q. He had no comment?
>
> A. I understand—
>
> Q. You can not give us your understanding. You can only state what you heard and what was said.
>
> A. All right.
>
> Q. Was there any comment about it all?
>
> A. No comment."

two parties can not be based upon a statement of one party which is met by silence on the part of the other. *Bladell* v. *Carroll*, 336 Ill. 168, 171 (1929). *Cf. 1 Restatement, Contracts* (1932) §72, p. 77; 1 *Williston, Contracts* (Rev. Ed. 1936) §91, p. 279.

Nor is this silence sufficient to establish an agreement negativing the implied warranty. Section 71 of the Illinois Uniform Sales Act requires an "express" agreement to negative an implied warranty (Ill. Rev. Stats. (1947), c. 121½ §71).[20] Moreover, this so-called disclaimer of warranty was never raised by International in the trial court. International's amended answer, motion for an instructed verdict, motion for a new trial and statement of points relied upon for reversal were all silent as to the existence of any such defense (R. 12, 202, 204, 211).

The record evidence establishes without contradiction each of the essential elements of International's liability to Globe. There is no record evidence of any defense sufficient to sustain a verdict in favor of International. The District Court's exclusionary rulings were correct, or even if incorrect, harmless error. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

III.

The Circuit Court of Appeals was without power to remand with directions to grant International's motion for a directed verdict and to enter judgment thereon.

The Circuit Court of Appeals reversed the judgment of the District Court in favor of Globe and directed the District Court to grant International's motion for a directed

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[20] Section 71 is as follows:

"§71. Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

verdict and to enter judgment thereon. International had made no post-verdict motion pursuant to Rule 50(b) for judgment in accordance with their motion for a directed verdict.

In *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947), this Court made clear that a party's failure to make such a post-verdict motion constituted an insuperable barrier to the entry by the Circuit Court of Appeals of a final judgment for the party losing below. The case is precisely like the *Cone* case except that here the jury returned its verdict at the direction of the District Court rather than as its own independent act. Although this may constitute a distinction in fact, it does not warrant a different result in view of the express language of Rule 50(b) and its purpose as announced in the *Cone* case and in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 250 (1940).

Rule 50(b) is as follows:

> "(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested ver-

> dict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Rule 50(b) deals uniformly with motions for directed verdicts and their consequences under all possible circumstances. Its language permits of no exceptions. With respect to its requirement of a post-verdict motion for judgment, it draws no distinction between whether the jury returned the verdict as its independent act, whether it returned the verdict at the direction of the trial court, or indeed, whether it failed to return any verdict at all. The Rule divides the possibilities into two categories: either a verdict was received, or it was not returned and the jury was discharged.

We take it that there is no question but that a directed verdict is one returned and received within the meaning of Rule 50(b) as fully as though it had been the independent act of the jury. This accords not only with what was actually done here (R. 177, 203-204), but with what has always been the view of a directed verdict. Thus, in *Hodges* v. *Easton*, 106 U. S. 408 (1882), the Court, speaking through Mr. Justice Harlan, said (at 412):

> "Upon the trial, if all the facts essential to a recovery were undisputed, or if they so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a peremptory instruction to find for plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court."

The terms "reception" and "return" of a verdict are words of art. It must be assumed that Rule 50(b) gives them their accepted meaning by applying them without distinction to all classes of verdicts. Had a departure from the

accepted meaning of these terms been intended by Rule 50(b), it would not have been accomplished *sub silentio*.

Even if the fact that the verdict was directed may suggest that it was not returned or received within the meaning of Rule 50(b), the post-verdict motion for judgment would still be required since this case must then be regarded as falling within the other category established by the Rule; that is, that the jury was discharged without returning a verdict. This seems to us, however, to be contrary not only to the record facts which disclose that the verdict was returned and received, but contrary to the historical conception of directed verdicts.[21]

The conclusion that Rule 50(b) applies equally to directed verdict cases is confirmed by its underlying policy. This Court in the *Cone* case made clear that it was the purpose of Rule 50(b) to provide a litigant with the opportunity to receive the trial court's peculiarly informed judgment as to whether the proceedings should be finally terminated or a new trial or nonsuit granted. We are wholly unable to see why Globe here, merely because it had a verdict directed in its favor, is less entitled to that opportunity than a litigant who has received a verdict as the independent act of the jury, or who has received no verdict at all due to the failure of the jury to agree.

The opinion in the *Cone* case might have been written with the facts of this case in mind. Here the Circuit Court of Appeals reversed and finally terminated the litigation by

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[21] This suggests the existence of quite another defect in the judgment of the Circuit Court of Appeals. It is not clear to us how the Circuit Court of Appeals can instruct a District Court to direct a verdict where the jury has already been discharged. *Hodges* v. *Easton*, 106 U. S. 408 (1882). *Cf. Barney* v. *Schmeider*, 9 Wall. 248 (1869). This paradox underscores the requirement of Rule 50(b) for a post-verdict motion for judgment in order to provide the foundation for the final disposition of the proceedings on appeal.

directing that judgment be entered for the defendants upon the ground that the plaintiff had alleged an express warranty but had failed to prove it. The court then denied rehearing upon the ground that evidence establishing an implied warranty was not a part of the record. Even assuming the Circuit Court of Appeals to have been correct in its view of the record, the *Cone* case compels the conclusion that the District Court should at least have been provided with the opportunity to determine what disposition should have been made of these proceedings. In the *Cone* case this Court said (330 U. S. at 217):

> "There are other practical reasons why a litigant should not have his right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question. Take the case where a trial court is about to direct a verdict because of failure of proof in a certain aspect of the case. At that time a litigant might know or have reason to believe that he could fill the crucial gap in the evidence. Traditionally, a plaintiff in such a dilemma has had an unqualified right, upon payment of costs, to take a nonsuit in order to file a new action after further preparation, unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit.
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> • • •
>
> "In this case had respondents made a timely motion for judgment notwithstanding the verdict, the petitioner could have either presented reasons to show why he should have a new trial, or at least asked the court for permission to dismiss. If satisfied from the knowledge acquired from the trial and because of the reasons urged that the ends of justice would best be served by allowing petitioner another chance, the judge could have so provided in his discretion." (footnote omitted)

It is inconceivable that the trial court would not have permitted Globe to "fill the crucial gap in the evidence" if it had been brought to the court's attention at the trial stage

of the proceedings, particularly since the allegedly missing proof was available and at hand.

Nor is it permissible to say that a verdict having been directed against International, it would have been a meaningless ritual for them to have moved for judgment in accordance with their motion for a directed verdict. It is undoubtedly true that denying the defendants' motion for an instructed verdict and directing a verdict for the plaintiff discloses a greater degree of conviction on the part of the trial court than denying the defendants' motion for an instructed verdict and submitting the issues to the jury for its independent judgment. It by no means follows that the trial court should thereby be conclusively presumed to be unwilling to correct the error if provided with the "opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone" (330 U. S. at 216).

The Circuit Court of Appeals approached the question from the wrong end of the stick. What it regarded as controlling was the submission of the issues to the jury for their independent consideration, whereas what the *Cone* case treats as controlling is the preservation to the trial judge of a subsequent and more leisurely opportunity both to determine whether he had erred, and if he had, to determine in his initial discretion whether the entry of judgment, the granting of a new trial or the permitting of a voluntary nonsuit would provide the most appropriate vehicle for the correction of that error. So viewed, it is clear that in interpreting Rule 50(b) and in distinguishing the *Cone* case, the Circuit Court of Appeals was guided by immaterial criteria not to be found in the Rule. The effect of its action is to rewrite Rule 50(b) so as to carve out an exception for directed verdict cases where none exists.

To hold Rule 50(b) to be without application where plaintiff's motion for a directed verdict is granted and the defendant's motion denied, would be ludicrous from still another point of view. The defendants would either have no means of obtaining judgment in the trial court despite error in directing the verdict for the plaintiff, or the time and manner of moving for judgment in this one class of cases would be unregulated by the Federal Rules. The possibility of any such anomalous result has never been suggested either by the Advisory Committee or any of the commentators upon the Federal Rules.

In reaching this result, the Circuit Court of Appeals stressed the Rule's purpose of avoiding the constitutional difficulties of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1913). Believing that these constitutional difficulties arose only where the issues were submitted without reservation to the jury for its independent action, the court concluded that Rule 50(b) was intended to deal only with this latter situation and not with a directed verdict case. No authority was relied upon.

There are two complete answers to the court's position. *First*, Rule 50(b) has not one, but two functions. As was pointed out in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 250 (1940):

> "Rule 50(b) merely renders unnecessary a request for reservation of the question of law or a formal reservation; and, in addition, regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct."

Even were the court correct in its limited view of the constitutional questions that the first sentence of Rule 50(b) was intended to solve, it does not follow that the Rule's second function, to regulate the time and manner of moving

for judgment because of the failure to direct, has no applicability to directed verdict cases. That it is in fact applicable to directed verdict cases has been amply demonstrated above.

Second, the limited view taken by the Circuit Court of Appeals of the constitutional problems that Rule 50(b) was intended to settle is historically inaccurate. In *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1913), the Court held it to be a reexamination of the facts contrary to the Seventh Amendment for the Circuit Court of Appeals to direct the entry of judgment notwithstanding the verdict where the issues had been submitted to the jury without reservation of the legal question raised by the motion for directed verdict.[22] Throughout its opinion the Court made clear that insofar as the constitutional objections were concerned, there was no difference between a case in which the verdict was returned by the jury as its independent act and a case in which the verdict was returned at the direction of the court. In neither could judgment be ordered for the other party. A new trial was required. Contrasting demurrers to the evidence with motions for directed verdicts, the Court said (at 395):

> "And when a judgment on a demurrer to the evidence is reversed because given for the wrong party, the error is corrected by ordering a judgment for the other party, whereas when a judgment is reversed for error in granting or refusing a request to direct a verdict, judgment is not ordered for either party, but a new trial is awarded. This was so at common law, and it has been the uniform course of action in this court from the beginning."

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[22] The holding of *Slocum* was recently reaffirmed in *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389 (1937).

After discussing certain earlier decisions, the Court said (at 387-388):

> "In principle, these cases are decisive of the question arising on the motion for judgment on the evidence notwithstanding the verdict. They show that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence, and that while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency or conclusive character of the evidence warrants such a direction, the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact. In other words, the constitutional guaranty operates to require that the issues be settled by the verdict of a jury, unless the right thereto be waived. It is not a question of whether the facts are difficult or easy of ascertainment, but of the tribunal charged with their ascertainment, and this, we have seen, consists of the court and jury, unless there be a waiver of the latter."

And again (at 398):

> "Whether in a given case there is a right to a trial by jury is to be determined by an inspection of the pleadings and not by an examination of the evidence. If the pleadings present material issues of fact, either party is entitled to have them tried to the court and a jury, and this is as true of a second trial as of the first. Whether the evidence is sufficient to sustain a verdict for one party or the other is quite another matter and does not affect the mode of trial, but only the duty of the court in instructing the jury and of the latter in giving their verdict. The issues to which the jury must respond are those presented by the pleadings, and this whether the evidence be disputed or undisputed and whether it be ample or meagre. To speak, therefore, of the evidence as determinative of the right to a trial by jury is to confuse the test of that right with a different test applicable only in

determining whether a particular verdict should be directed."

A contemporary commentator also saw the *Slocum* case as applying equally to directed verdicts. *Schofield, New Trials and the Seventh Amendment*, 8 Ill. L. Rev. 287, 288-289 (1913).

In *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654 (1935) this Court approved the final disposition of the proceedings by a Circuit Court of Appeals where the legal questions raised by the motion for a directed verdict had been expressly reserved by the trial court, pointing out that this procedure was well-established at common law (at 659). The practice of reserving the legal questions in order to permit the final disposition of the proceedings without a new trial was followed not only in independent verdict cases, but also in directed verdict cases.[23] Indeed, in *Redman* the Court relied upon directed verdict and nonsuit cases to illustrate the very practice that it was approving, 295 U. S. at 659-660, fn. 5.

It is agreed that the first sentence of Rule 50(b) was intended to obviate the constitutional objections announced in *Slocum* by making automatic the reservation procedure approved in *Redman*. As we have shown, the same constitutional objections were raised by *Slocum* with respect to directed verdict cases and the reservation procedure approved in *Redman* had theretofore been required to be followed in directed verdict cases as well, unless a new trial were to be the only remedy. It follows that the Circuit Court of Appeals erred in concluding that the first sentence of Rule 50(b) does not apply to directed verdict cases. To hold as did the Circuit Court of Appeals is

[23] See *e.g. Baylis* v. *Travelers' Insurance Company*, 113 U. S. 316 (1885); *Suydam* v. *Williamson*, 20 How. 427 (1857).

equivalent to holding that Rule 50(b) settled only half of the constitutional questions raised by *Slocum*. This seems to us to be inconceivable.

It is, of course, unnecessary for us to argue that in a directed verdict case in which the legal questions were not reserved, the Seventh Amendment inevitably requires a new trial for error in refusing to direct a verdict. It is sufficient to say that in the light of *Slocum* and prior decisions, such an outcome was a definite possibility. The first sentence of Rule 50(b) was intended to eliminate any such possibility without the necessity for adjudication.

Moreover, our view is fortified by the broad sweep of the language of the first sentence of Rule 50(b):

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted. . . ."

The language is unqualified and applies to any case in which a motion for a directed verdict has been denied or for any reason not granted. It is of no importance in bringing the Rule into play that the other party's motion may have been granted.

If, on the other hand, this Court were to conclude, as did the Circuit Court of Appeals, that Rule 50(b) is without application to this situation, then the constitutional problem is squarely presented since, apart from Rule 50(b), the legal questions raised by International's motion for a directed verdict were not reserved for a later determination.

IV.

The Circuit Court of Appeals was without power to direct the District Court to grant International's motion for a directed verdict upon grounds not specified in the motion.

There is no doubt but that the Circuit Court of Appeals rested its judgment instructing the District Court to grant

the defendants' motion for a directed verdict upon grounds not specified in that motion. The Circuit Court of Appeals relied solely and expressly upon the ground that the complaint had alleged, and Globe had relied upon, an express warranty as to which there was a total failure of proof (R. 231). On denial of the petition for rehearing the Circuit Court of Appeals determined (contrary to the fact) that the proof relied upon by Globe as establishing an implied warranty was not in the record (R. 258). Neither of these grounds had been specified or intimated in the defendants' motion for a directed verdict, which the Circuit Court of Appeals directed the District Court to grant (R. 202). As a matter of fact, the third ground of the defendants' motion for a directed verdict assumed the existence of a warranty and argued merely that the evidence was insufficient to establish such a breach as would entitle the plaintiff to reject the entire shipment (R. 202).

Rule 50(a) requires that a motion for a directed verdict shall "state the specific grounds therefor."[24] Rule 50(b) provides that if such a motion be not granted, the action is submitted to the jury subject to the later determination of the "legal questions raised by the motion", and authorizes a motion to have "judgment entered in accordance with [the party's] motion for a directed verdict." The Rule, therefore, discloses a coherent scheme to require the grounds for a motion for a directed verdict to be fully dis-

[24] Rule 50(a) is as follows:

"(a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor."

played, and to give both the trial court and the other party a full and repeated opportunity for mature consideration of those grounds in order that timely correction could be made if necessary. The Circuit Court of Appeals read the Rule as though the quoted language were omitted. It determined that the District Court had erred in doing what it was never asked to do.

The effect of the decision is to authorize appeals based upon errors lurking in the record which might have been corrected either by the parties or the trial court had they been appropriately raised. This Court pointed out in the *Cone* case that the motion under Rule 50(b) for judgment in accordance with the motion for a directed verdict afforded the trial judge a last chance to correct his errors. This becomes a futile last chance indeed if a party need not specify his grounds in his motion for a directed verdict.

As the notes of the Advisory Committee on Rules for Civil Procedure show, the requirement of Rule 50(a) that a motion for a directed verdict shall state the specific grounds therefor was intentionally adopted for the purpose of resolving a conflict between the Circuit Courts of Appeals over the correct Federal practice. And under Rule 50, other Circuit Courts of Appeals have consistently assumed that the motion for a directed verdict must specify its grounds before those grounds will be noticed upon appeal. *Virginia-Carolina Tie & Wood Co.* v. *Dunbar*, 106 F. (2d) 383 (C.C.A. 4th, 1939); *Atlantic Greyhound Corporation* v. *McDonald*, 125 F. (2d) 849 (C.C.A. 4th, 1942); *Ryan Distributing Corp.* v. *Caley*, 147 F. (2d) 138 (C.C.A. 3rd, 1945) *cert. den.* 325 U. S. 859 (1945).

Moreover, in applying Rule 50 as it did, the Circuit Court of Appeals revived the constitutional question raised in *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1913), and that were intended to be put at rest forever by the Federal Rules. *Supra*, pp. 35-38.

Only legal questions raised by the motion for a directed verdict are reserved by Rule 50(b) for later determination. Under Rule 50(a) a motion for a directed verdict raises only the legal questions specified. It follows, therefore, that since the decision of the Circuit Court of Appeals was based on grounds not specified in International's motion for a directed verdict, it was based on legal questions not reserved for later determination by Rule 50. Hence, unless that action be held prohibited by Rule 50, there is squarely raised the substantial constitutional question heretofore discussed.

V.

In any event, the direction by the Circuit Court of Appeals that the proceedings be finally terminated was arbitrary, capricious and an abuse of discretion.

Wholly apart from the question of its power, the action of the Circuit Court of Appeals in finally terminating the litigation without giving Globe an opportunity to remedy the alleged deficiency in the proof was arbitrary, capricious and an abuse of discretion. Whether or not the Todes testimony was admitted into evidence, the record on appeal clearly disclosed its existence and availability. With it, there was plainly a meritorious cause of action. The arbitrariness of the court's action is underscored by the fact that the alleged defect was never raised by International below, and, accordingly, neither the trial court nor Globe was ever provided with an opportunity to remedy it.

This litigation did not take place in the time of Lord Coke. The action of the Circuit Court of Appeals does not conform to modern conceptions of litigation as a means to the peaceful determination of substantial rights, rather than as a sporting event.

We submit that it was an abuse of discretion for the Circuit Court of Appeals not to remand for a new trial.

Conclusion

The judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed. Even were this Court to conclude to the contrary, so much of the judgment of the Circuit Court of Appeals as directs the District Court to grant International's motion for a directed verdict and to enter judgment thereon should be reversed and these proceedings should be remanded to the Circuit Court of Appeals with instructions to remand to the District Court for a new trial.

Respectfully submitted.

BEN W. HEINEMAN
JOSEPH D. BLOCK
Attorneys for Petitioner

SWIREN HEINEMAN & ANTONOW
Suite 1406
135 South LaSalle Street
Chicago 3, Illinois
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 205

GLOBE LIQUOR COMPANY, INC., A CORPORATION,

Petitioner,

v.

FRANK SAN ROMAN and DOROTHEA SAN ROMAN, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF INTERNATIONAL INDUSTRIES,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY BRIEF

BEN W. HEINEMAN,
JOSEPH D. BLOCK,
Attorneys for Petitioner.

HEINEMAN & ANTONOW
Suite 1406
135 South LaSalle Street
Chicago 3, Illinois
Of Counsel

LINCOLN PRINTING COMPANY, CHICAGO—WABASH 4004

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PETITIONER'S REPLY BRIEF

I.

The portion of the Todes deposition relied upon to establish that respondents were dealers was admitted into evidence.

In the trial court, after discovering that he had failed to offer in evidence the portions of the Todes deposition to which objections had not been sustained, respondents' counsel sought and obtained the consent of Globe's counsel and the order of the trial court that such portions of the deposition be "considered as introduced in the record." (R. 177-178). In the Circuit Court of Appeals, the respondents utilized certain of those portions of the deposition in their briefs and oral argument. Not only that, but after the Circuit Court of Appeals had held that "no part of the deposition was ever read or considered as read in evidence", respondents requested the Circuit Court of Appeals to

modify that conclusion and to hold that the portions of the Todes deposition upon which *they* relied had properly been admitted into evidence. (R. 262-264, 266). In their brief in opposition to the petition for certiorari, respondents stated that "for the purpose of considering this Petition for *Certiorari*, it may be considered that those portions of the deposition of Todes contained at pages 17 and 18 of petitioner's Petition were introduced in evidence." (at 25).

Respondents' counsel now asks this Court to hold that the express agreement between counsel, and the express ruling of the trial court, sought and obtained by respondents' counsel to cure his oversight, were ineffective to make that evidence a part of the record. (Resp. Br. 15-20). We confess to a feeling of outrage and shock that any attorney should repudiate and seek to have overthrown an agreement and order so obtained.

In general terms, the most obvious considerations of public policy operate to sustain agreements between counsel and orders entered thereon aimed at remedying oversights in the course of litigation. Everything was done, by both counsel and by the court, that could have been done to insure that Mr. Kahn's oversight in failing to make the necessary offer would not injure his clients on appeal. We cannot believe that it was beyond the power of the parties, with the approval of the trial court, to take such action, but that is what respondents now claim.

More specifically, whether or not the trial court's order was erroneous is not and cannot be before this Court. Having been induced by respondents' counsel and predicated upon an agreement between both counsel, the order was of course made without objection. It is fundamental that in such circumstances the court's ruling is not open to attack upon appeal. The only question open either in the Circuit

Court of Appeals or this Court with respect to the trial court's order is its scope. This question has been thoroughly discussed in our principal brief. (Pet. Br. 12-15). Without repeating the discussion here, suffice it to say that the record makes clear that the testimony upon which Globe relies to establish that the respondents were dealers within the meaning of Section 15(2) of the Illinois Uniform Sales Act was included within the scope of the trial court's ruling and hence was duly admitted into evidence.

II.

The respondents' contentions that there is no implied warranty are without merit.

As was pointed out in our principal brief (Pet. Br. 16-21), there are but two elements necessary to establish an implied warranty of merchantable quality: the sale must be by description and the sellers must be dealers in goods of that description. Ill. Rev. Stats. (1947) c. 121½, §15(2). Both of these two elements are established by the record evidence. Many of the respondents' contentions were anticipated and considered in our principal brief. There are, however, certain additional comments that should be made.

A.

Even if the complaint be construed as alleging an express warranty of merchantability, it is unsound to say that an implied warranty of merchantable quality may not be established in lieu thereof. (Resp. Br. 40-41). It is unnecessary to consider the well-known rule of the law of sales that where express and implied warranties are inconsistent, the implied warranty is negatived. Regardless of the scope of that rule, it should plainly not be invoked unless an express warranty exists. Globe did not rely upon nor introduce evidence with respect to the existence of an

express warranty. The Circuit Court of Appeals expressly held that there was no express warranty (R. 231) and respondents assert the same thing. There having been no express warranty, there can be no inconsistency between it and the implied warranty of merchantability upon which recovery is sought. Ill. Rev. Stats. (1947) c. 121½, §15(6). Moreover, this contention of respondents ignores Rule 15(b) of the Federal Rules, which permits amendment of the pleadings to conform to the evidence.

B.

Respondents state that the petitioner did not rely on the skill, choice or selection of the goods by the respondents, and that, hence, there could not have been any implied warranty with respect to this transaction. (Resp. Br. 42). The applicable rule of decision is other than that stated by respondents. The express language of the Illinois Uniform Sales Act makes clear that reliance upon the seller's skill or judgment is relevant only in raising an implied warranty of fitness for a special purpose under Section 15(1) and has nothing to do with the implied warranty of merchantable quality established by Section 15(2) of that Act. Ill. Rev. Stats. (1947) c. 121½, §15.

C.

Respondents contend that since they were agents they could not be dealers within the meaning of Section 15(2) of the Illinois Uniform Sales Act. (Resp. Br. 46-47). This contention is unsupported by any pertinent authority. Assuming *arguendo* that respondents were agents, the two decisions which they cite involve state Securities Acts which by statutory definition excluded salesmen or agents from the term "dealers". Moreover, the record evidence in this case establishes that the respondents were prin-

cipals in the transaction, or, at the very least, agents of an unidentified shipper and hence responsible as principals upon their contract. *Infra* pp. 10-11.

D.

There is no merit in the contention of the respondents that an implied warranty of merchantable quality is not raised in sales between dealers. *Annotation,* 64 A. L. R. 883, 884, (1929). And in a case involving similar facts between a different plaintiff and these respondents and tried before a different judge without a jury, the District Court for the Northern District of Illinois in entering judgment against these respondents so held. *Alex J Mandl, Inc.* v. *San Roman,* (N. D. Ill. E. D. Dkt. No. 45C121, memo. op., LaBuy, J., dated September 17, 1947, unreported). In that opinion the District Court said:

> "Having before it only one reported [Illinois] case involving dealer transactions, but having also considered the apt expression of theory of both the Illinois, New York, and other cases, this court feels that the warranty imposed by Section 15(2) of the Illinois Uniform Sales Act extends to dealings between dealers."

E.

Both in their brief (Resp. Br. 40) and in their Objections to Motion of Petitioner for Transfer of Case to Regular Docket (p. 3), filed on December 12, 1947, respondents pervert the statement of the Circuit Court of Appeals that amendment of the complaint pursuant to Rule 15(b) was not requested until after oral argument into a statement that the existence of an implied warranty had never been asserted by petitioner prior to that time. What the Circuit Court of Appeals said is perfectly clear from a reading of its Opinion on Rehearing and it is unnecessary to do more

than bring counsel's misstatement to the attention of this Court. (R. 257-258). As we have pointed out elsewhere, the entire case was tried on the assumption that a warranty existed and that the only issues were whether the respondents had acted as agents of a disclosed principal in Mexico or whether they had been orally exonerated from liability as agents. (Pet. Br. 4). In their brief in the Circuit Court of Appeals, respondents dealt at length with the issue of implied warranty. At the oral argument, the question of whether or not an implied warranty existed was the subject of considerable discussion.

It is perfectly true, as the Circuit Court of Appeals said, that the suggestion that the complaint be treated as amended pursuant to Rule 15(b) to conform to the evidence of the implied warranty was not made until after oral argument and before the court rendered its opinion. Until the oral argument, when the court clearly showed a disposition to regard the complaint as alleging an express warranty, we had never regarded such an interpretation as a probable one. We still feel that it was unduly harsh and technical and contrary to the provisions of Rule 8(f) of the Federal Rules that pleadings "shall be so construed as to do substantial justice".

The Circuit Court of Appeals patently did not regard as untimely the request that the pleadings be amended to conform to the evidence of an implied warranty. It conceded that amendment would be appropriate if the evidence established such a warranty. The circuit courts of appeals regularly and properly follow the practice of liberally construing Rule 15(b) to authorize amendments to conform to the evidence. This is done even where the evidence is not complete as here but is sufficient to show the existence of a *bona fide* cause of action.

For the proper practice, see *Wall* v. *Brim*, 138 F. (2d) 478, 481 (C. C. A. 5th, 1943); *Wall* v. *Brim*, 145 F. (2d) 492, 493 (C. C. A. 5th, 1944), *cert. den.* 324 U. S. 857; *Venuto* v. *Robinson*, 118 F. (2d) 679, 683 (C. C. A. 3rd, 1941); *Cabel* v. *United States*, 113 F. (2d) 998, 1000 (C. C. A. 1st, 1940); *American Fork & Hoe Co.* v. *Stampit Corporation*, 125 F. (2d) 472, 474 (C. C. A. 6th, 1942); *Lientz* v. *Wheeler*, 113 F. (2d) 767, 769 (C. C. A. 8th, 1940).

III.

Under Illinois law, the agent of an unidentified principal is liable as principal upon his contracts.

Respondents offered evidence to show that they had communicated the name of their alleged principal to Globe. The evidence showed on its face that the communication had taken place after Globe had become firmly bound to purchase the merchandise. We showed in our principal brief that this evidence was properly excluded by the District Court since under Illinois law the agent of an unidentified principal is liable as principal upon his contracts and a disclosure of the identity of his principal subsequent to the third person's becoming bound comes too late to relieve the agent of liability. (Pet. Br. 24-28).

The respondents assert *first*, that the mere disclosure of an agency status even without identification of the principal will relieve the agent of liability in the absence of an express agreement to be bound (Resp. Br. 61-67) and *second*, that the disclosure of the identity of the respondents' alleged principal had been made in apt time. (Resp. Br. 56-61). These points will be briefly considered.

A.

In our principal brief we relied upon *Annes* v. *Carolan, Graham, Hoffman, Inc.*, 336 Ill. 542 (1929) to show that in Illinois the agent of a partially disclosed principal, that

is, an agent whose agency status had been disclosed but whose principal remained unidentified, was liable as principal upon his contracts. The respondents seek to distinguish this case upon the ground that it is a case of a so-called "non-existent" principal. (Resp. Br. 62). The distinction is plainly unsound in view of the court's statements that "the question is whether under this undisputed evidence the principals whom defendant in error represented were wholly or partially undisclosed" and "defendant in error acted as the agent of the underwriters, namely, Morgan, Lyons & Co., who were members of Lloyd's at London." 336 Ill. at 546.

Respondents point to *Chicago Title and Trust Co.* v. *DeLasaux,* 336 Ill. 522 (1929), decided on the same day as the *Annes* case *supra,* as a contrary authority. The opinion in the *DeLasaux* case clearly states that *both* the fact of agency and the identity of the principal were fully disclosed to the third party with whom the agent had dealt. 336 Ill. at 526. After making this abundantly clear, the court again stated that "there was no question of an undisclosed principal." *Id.* This sentence immediately precedes the partial excerpt quoted by respondents at page 63 of their brief to show the contrary.

Similarly, in each of the other cases cited by respondents in support of their contention (Resp. Br. 63-66), both the fact of agency and the identity of the principal were fully disclosed to the third party or known by him. That is not the present case. Here we are concerned with a partially disclosed or unidentified principal. The *Annes* case, *supra* as well as the other Illinois decisions and general texts cited by the petitioner in its principal brief, represent the well-established law of the state of Illinois and are decisive. (Pet. Br. 24-28.)

B.

In asserting that the disclosure of the identity of their alleged principal on May 10, 1944, was timely, respondents are driven to asserting not only that there was no agreement at all between the parties but that the irrevocable letter of credit became irrevocable only when acted upon by drawing a draft thereunder. (Resp. Br. 56-61.)

Under the written agreement between the parties, Globe was firmly bound. That agreement consisted of its order or offer, a counter-offer by Todes, respondents' agent, and the acceptance by Globe, all of which incorporated by reference the terms of the letter of credit. (Pl. Exs. 1-4; R. 178-181, 63-67.)

What the respondents assert is that the disclosure to Globe of the identity of their alleged principal six weeks after the exchange of letters and the delivery of the irrevocable letter of credit to them as beneficiaries relieved them from liability. Their theory is that at that time had Globe been dissatisfied with the principal it could have withdrawn from the transaction. This can only be characterized as an argument made in complete disregard of the written word.

It is true that at the time the identity of respondents' alleged principal was communicated to Globe, no drafts had yet been drawn against the irrevocable letter of credit, but it is equally true that the letter of credit expressly named the respondents as beneficiaries, was expressly designated as irrevocable and expressly authorized assignment by the respondents. The Chase National Bank was firmly bound under that letter of credit to pay any drafts that might be presented in accordance with its terms, and Globe was firmly bound to reimburse the Chase National Bank. Neither Chase nor Globe could have recalled the

letter of credit, except for fraud. (Pl. Ex. 4; R. 181, 67.) Nor could Globe have refused to accept delivery of the merchandise under its agreement. Even assuming the respondents to have been agents, the disclosure came too late to relieve them of liability. (Pet. Br. 24-25.)

IV.

There is no evidence or offer of proof that respondents were in fact agents of the Mexican shipper.

Repeatedly in their brief, respondents assert that they were agents and that the petitioner admitted them to be agents. The fact is that the complaint alleged them to be principals and that the record discloses them to be principals. Petitioner has merely stated that since they had failed to make a timely identification of their alleged principal, it is of no importance whether they are principals, or agents of an unidentified principal.

Respondents' amended answer raised as an affirmative defense that they were the agents of Gonzalo A. Larrea, the Mexican shipper. (R. 12, 14, 15). Agency is a fact to be proved like anything else. It is established by written or oral agreement between the principal and his agent. Statements by respondents' salesman to Globe that the respondents were agents, even if made, are without probative value in establishing that the respondents were the agents of another. At no time in the course of the entire trial did the respondents make an offer of proof of an agency agreement, either written or oral. None was offered as an exhibit and the detailed offer of proof as to what the testimony of San Roman would have been if he had been permitted to testify is loudly silent as to the creation of an agency relationship between him and the Mexican shipper or anyone else. (R. 165-166).

Respondents' counsel apparently assumes that agency is established by a showing that the tequila was shipped from Mexico to its ultimate destination. It was of course known that the tequila came from Mexico. That is of no significance in ascertaining whether respondents were principals or agents. They could have sold as principals either merchandise which they owned in Mexico, or merchandise which they did not own but expected to acquire after they had Globe's agreement to purchase, supported by an irrevocable letter of credit.

We continue to assert that it is a matter of indifference under Illinois law whether the respondents sold the tequila as principals or as the agents of an unidentified principal, but the fact is that not only have the respondents wholly failed to make any offer of proof showing them to be agents, but the entire correspondence between Globe and the respondents or their salesman, as well as their insistence upon delivery of an irrevocable letter of credit naming them and no other as beneficiaries (R. 98), makes clear that they were the principals in fact.

V.

Respondents introduced no evidence to show that mitigation of damages was feasible.

Respondents assert that Globe was under a duty to accept the direction of the Mexican shipper to recondition the merchandise at the Mexican shipper's expense. (Resp. Br. 50). This so-called offer was contained in Defendants Exhibit 11 for identification which was properly excluded by the trial court. (R. 199, 172). There was no duty upon Globe to act upon the instructions of a person in Mexico whom it did not know and with whom it had had no relationship.

But regardless of this, it is established that the burden was upon the respondents to show that the damages could

have been mitigated through the exercise of reasonable means. *Paramount Pictures Distributing Corporation* v. *Gehring*, 283 Ill. App. 581 (1936); *Standard Growers Exchange* v. *Hooks*, 22 F. (2d) 599, 600 (C.C.A. 5th, 1926); *Annotation*, 134 A. L. R. 242 (1941). The respondents offered no evidence to show what the cost of filtering and rebottling the merchandise would have been or that such an undertaking was feasible either in the sense that it was technically possible or that there were rectifiers available to do it.

VI.

The Circuit Court of Appeals was without power to remand with directions to grant International's motion for a directed verdict and to enter judgment thereon.

In our principal brief we made clear that because of the failure of the respondents to make a motion for judgment in accordance with their motion for a directed verdict pursuant to Rule 50(b) of the Federal Rules, the Circuit Court of Appeals was without power to terminate the litigation by directing the District Court to grant respondents' motion for a directed verdict and enter judgment thereon. Among other things, this Court's decision in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947) was relied upon. That argument will not be repeated here. (Pet. Br. 28-42.)

Two of respondents' points require brief consideration. Respondents assert that their motion for a new trial was equivalent to a motion for judgment in accordance with their motion for a directed verdict within the meaning of Rule 50(b). (Resp. Br. 10-15). The Federal Rules of Civil Procedure, of course, draw a sharp distinction between the post verdict motion for judgment authorized by Rule 50(b) and the motion for a new trial authorized by Rule 59. Indeed, Rule 50(b) recognizes the separate character of the

motions by authorizing them to be joined or requested in the alternative. And this Court in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243 (1940), pointed out that "each motion, as the rule recognizes, has its own office." (at 251)

Wholly apart from this novel view of the function of a motion for a new trial, respondents' argument is absurd on its face. The discretion exercised by a trial court in considering whether a losing *defendant's* motion for a new trial should be granted is wholly unlike the discretion protected by the *Cone* case and exercised by a trial court in considering whether a new trial should be ordered for a *plaintiff* after becoming convinced that it had erred in denying the defendant's motion for a directed verdict.

Respondents also assert, as did the Circuit Court of Appeals, that only questions of law are involved and that, hence, the *Cone* case is without application (Resp. Br. 33-37). Both the Circuit Court of Appeals and the respondents misread the *Cone* case. In that case this Court assumed that the Circuit Court of Appeals was correct in determining that there were no questions of fact for the jury and that only questions of law were present, but held, nevertheless, that the Circuit Court of Appeals was without power to direct the entry of final judgment in the absence of an appropriate post-verdict motion under Rule 50(b). 330 U. S. at 250. Thus, there is no distinction between the *Cone* case in the posture in which it was considered by this Court, and this case as viewed by the Circuit Court of Appeals and the respondents.

Throughout their brief, respondents repeated time and again that only questions of law are involved. As we have pointed out, even if true, this would not permit the Circuit

Court of Appeals to terminate the litigation in view of the procedural status of this case. The petitioner believes that the District Court was correct in instructing a verdict, and that no questions of fact are presented as to the existence of the essential elements of respondents' liability to the petitioner. But it certainly does not follow that if the petitioner be wrong in this respect, that a verdict must be directed for the respondents. Rebuttal evidence in the possession of petitioner was never offered since the exclusion of so much of the Todes deposition and the respondents' exhibits made it unnecessary to do so.

If the petitioner should be wrong in its conclusion that the trial court properly directed a verdict, then it is for the trier of the facts to determine the contested issues.

VII.

It was error to direct the District Court to grant respondents' motion for a directed verdict upon grounds not specified in that motion.

Although conceding that the District Court's judgment was reversed upon grounds not specified in their motion for a directed verdict, the respondents urge that that motion should be read in the light of their having brought these grounds to the attention of the trial court at earlier stages of the proceedings. It is unnecessary to consider whether a motion for an instructed verdict should be so read since at no time were the grounds upon which the Circuit Court of Appeals disposed of this case ever brought to the attention of the trial court. Each of respondents' record citations may be examined in vain for any contention on the part of the respondents before the trial court that Globe had alleged and failed to prove an express warranty

(the ground upon which the Circuit Court of Appeals rested its reversal and direction that judgment be entered), or that there was a failure of proof on the part of Globe of an essential element of an implied warranty (the ground upon which the Circuit Court of Appeals denied the petition for rehearing).

As we read respondents' brief, they do not even assert the contrary. They say at most that they had raised below the question of whether or not all warranties had been disclaimed. There is a substantial difference between asserting that an implied warranty has been disclaimed and asserting that the essentials creating an implied warranty do not exist. Ill. Rev. Stats. (1947) c. 121½, §§15(2), 71.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed. Even were this Court to conclude to the contrary, so much of the judgment of the Circuit Court of Appeals as directs the District Court to grant respondents' motion for a directed verdict and to enter judgment thereon should be reversed and these proceedings should be remanded to the Circuit Court of Appeals with instructions to remand to the District Court for a new trial.

Respectfully submitted.

BEN W. HEINEMAN
JOSEPH D. BLOCK
Attorneys for Petitioner.

SWIREN HEINEMAN & ANTONOW
Suite 1406
135 South LaSalle Street
Chicago 3, Illinois
Of Counsel

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 205

GLOBE LIQUOR COMPANY, INC., A Corporation,
Petitioner,

vs.

FRANK SAN ROMAN and DOROTHEA SAN ROMAN,
Doing Business Under the Firm Name and
Style of International Industries,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

NAT M. KAHN
33 South Clark Street
Chicago 3, Illinois
Attorney for Respondents.

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IN THE

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GLOBE LIQUOR COMPANY, INC., A Corporation,
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FRANK SAN ROMAN and DOROTHEA SAN ROMAN,
Doing Business Under the Firm Name and Style of
International Industries,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

INTRODUCTION.

The chief points of the respondents in opposition to the petitioner's petition for certiorari are summarized as follows:

a. Neither Rule 50 of the Federal Rules of Civil Procedure nor the case of *Cone* v. *West Virginia Pulp and Paper Co.* apply to the instant suit, where the trial

court directed a verdict and entered judgment on the motion of the petitioner without submitting the case to the jury. *The facts were undisputed and fully developed in behalf of the petitioner*, so that only questions of law were involved. Therefore, it was unnecessary for the respondents to file a motion for judgment notwithstanding the verdict to enable the Circuit Court of Appeals to reverse the judgment in behalf of the petitioner entered in the trial court and to enter judgment for the respondents on the legal questions involved.

b. The disclaimer of any warranty as to the goods in question by the respondents and the absence of any express or implied warranty as to the goods were raised by the respondents in the trial court.

c. The grounds of the respondents' motion for a directed verdict in the trial court and the basis of the reversal and entry of judgment for the respondents by the Circuit Court of Appeals were presented in the trial court.

d. Even if the portions of the depositions of Todes, the salesman for the respondents, described in the petitioner's petition for certiorari, had been admitted in evidence, the petitioner would not be entitled to any recovery because of the undisputed disclaimer of any warranty as to the goods by the respondents, and the absence of any express or implied warranty as to the goods.

e. The respondents filed within ten days a motion in the trial court to set aside the verdict and judgment and for a new trial. This motion had the same legal effect as a motion by the respondents for judgment notwithstanding the verdict would have had if filed in the trial court, assuming, but not conceding, that Federal Rule

50 (b) applied to the case at bar. The respondents' motion for a new trial permitted the trial court to exercise its discretion to choose between the alternative of either ordering a new trial or entering judgment for the respondents on their prior reserved motion for a directed verdict. When the trial court denied the respondents' motion for a new trial it exercised its discretion in that regard.

f. The entry of judgment in favor of the respondents by the Circuit Court of Appeals was fair and just on the undisputed facts and applicable legal principles. The shipper of the goods in Mexico, the principal and actual seller, promptly offered to recondition the goods at his own expense under United States Government supervision. This offer was rejected by the petitioner. Had this offer been accepted, the original sale would have been fully performed and no one would have been injured.

g. There are no conflicting decisions by any Circuit Courts of Appeals as to the non-applicability of Rule 50 of the Federal Rules of Civil Procedure when the trial court grants a motion for a directed verdict and enters judgment without submitting the case to the jury for its independent determination of the facts. It is clear beyond all doubt that the purposes, history and plain and unambiguous language of Rule 50 of the Federal Rules of Civil Procedure establish that this rule was not intended to nor does it apply to a case where the trial court directs a verdict and enters judgment without submitting the case to the jury.

h. Assuming that in the trial court, motions for judgment notwithstanding the verdict of the jury had been made in the cases of *Cone* v. *West Virginia Pulp*

and Paper Co., Berry v. *United States, Conway* v. *O'Brien* and *Halliday* v. *United States, the Circuit Court of Appeals would not have had the power to reverse the judgment of the trial court and enter judgment for the appellant in each of these cases, as they involved controversies of fact that had to be decided by a jury.*

II.

The Basic Issue and Inconsistent Position of Petitioner As to Trial By Jury.

The chief question presented by the petition for certiorari relates to Rule 50 of the Federal Rules of Civil Procedure which involves motions for directed verdicts in jury trials, and the automatic reservation of the decision on the motion by the trial court with power to determine the legal questions raised by the motion after the jury has returned a verdict after exercising its own judgment on the facts.

In the instant suit, the petitioner's basic procedural point is that the Circuit Court of Appeals did not have the power after it reversed the judgment of the trial court, to enter a judgment for the respondents because of their failure to file a motion for judgment in their favor in the trial court. The respondents' motion for a directed verdict at the conclusion of all the evidence had been promptly denied by the trial court and the trial court, instead, directed a verdict for the petitioner and immediately entered judgment for the petitioner on the directed verdict. Then within ten days thereafter, the respondents filed a detailed motion to set aside the directed verdict and judgment and for a new trial, and this motion was promptly denied by the trial court. (Rec. 204-6, 209.)

The petitioner relies heavily on this court's decision in *Cone* v. *West Virginia Pulp & Paper Company*, 67.

S. Ct. 752, in support of its contention that the Circuit Court of Appeals in the instant suit did not have the power to reverse the judgment entered by t..e trial court and to enter judgment for the respondents on appeal, because the respondents failed to file a motion for judgment in the trial court notwithstanding the verdict under Rule 50 (b) of the Federal Rules of Civil Procedure.

The *Cone* case and all the other cases relied upon by the petitioner and cited by it in its petition were all jury cases, *i. e.*, cases where in each instance the trial court permitted the case to be submitted to the jury to exercise its independent judgment as to the facts. In every case cited by the petitioner decided by this court the original jury verdict rendered in the trial court was either sustained, or the case was remanded to the trial court for a new trial before a jury. In other words, *all these cases involved controverted questions of fact* that should have been or would have to be passed on by a jury for its independent judgment as to the facts. In each of these cases there existed a constitutional barrier for the Circuit Court of Appeals to enter a final judgment because these cases involved conflicting factual questions that had to be decided by a jury.

In the instant suit, as amplified later, it will be seen that only questions of law were involved, that all of the facts were undisputed and the petitioner's proof was fully developed, and that there was no question of any missing element of proof or missing witnesses in behalf of the petitioner. Moreover, there was no question nor is there any question in the instant case that any evidence was improperly admitted in the trial court in behalf of the petitioner, that requires supplanting or correction.

An analysis of the purposes, history and wording of Rule 50 of the Federal Rules of Civil Procedure discussed later in this brief demonstrates without doubt that Rule 50 does not apply when the trial court grants a motion for a directed verdict when made and does not submit the case to the jury for its independent determination of the facts. It will also be seen that this rule only applies to cases where the court reserves its motion for a directed verdict and permits the case to go to the jury for its independent determination of the facts, and after the jury returns its verdict, the trial court then has the power to rule on the previously reserved motion for a directed verdict, notwithstanding the verdict of the jury.

The respondents, who were the defendants in the trial court, asked for a trial by jury. The petitioner, the plaintiff in the trial court, did *not* ask for a trial by jury. After the evidence was completed, it appeared to both parties that there was no disputed question of fact and that only questions of law were involved. At the conclusion of the petitioner's case, the respondents made an oral motion for a directed verdict, and the grounds in support of this motion were argued at length orally in the trial court (Rec. 116-120). This motion was denied by the trial court.

At the conclusion of all the evidence in the case, the petitioner made an oral motion for a directed verdict *without assigning any grounds* in support of its motion (Rec. 173), and the respondents filed a written motion for a directed verdict. (Rec. 202). The trial court denied the respondents' motion for a directed verdict and promptly allowed the petitioner's unsupported oral motion for a directed verdict (Rec. 173-176).

It comes with ill grace for the petitioner in this court to confuse the precise question involved by its fallacious argument that the Circuit Court of Appeal's order entering judgment in favor of the respondents after reversal of the judgment in the trial court, violated petitioner's right to a trial by jury when the petitioner did all that it could in the trial court to prevent the case from being passed on by the jury. Moreover, the petitioner was successful in the trial court in preventing the jury from passing on the case.

This afterthought by the petitioner in now demanding a new trial by jury has no merit as the instant case involves only questions of law on undisputed facts that were fully developed in behalf of the petitioner in the trial court.

Both before and after the adoption of the Federal Rules of Civil Procedure, Circuit Courts of Appeals have always had the inherent, historical and statutory power to enter final judgment, without remanding the case to the trial court for a new trial, where only questions of law are involved, and the facts were undisputed and presented fully in the trial court, and there was a directed verdict in the trial court without the case being submitted to the jury for its independent determination as to the facts. Under these circumstances, the case becomes, in effect, a trial by the court without a jury.

The grounds of respondents' motion for directed verdict in their behalf were fully and adequately stated in the trial court and were fully argued there. We amplify this statement later in this brief. Moreover, the failure of the petitioner to prove the existence of *either an express or an implied warranty* as to the goods in question, and the existence of a disclaimer of any warranty by respondents were points that were fully raised in the trial court and argued there.

There are no conflicting decisions in the various Circuit Courts of Appeals as to the basic questions involved in the case at bar relating to Rule 50 of the Federal Rules of Civil Procedure. The rule is clear, literate and unambiguous, and free from doubt and it patently applies only to cases where the trial court, notwithstanding its reservation for a directed verdict as to legal questions involved, permits the case to go to the jury for its independent determination of the facts, and then the trial court later passes on the legal questions reserved by the previous motion for a directed verdict. The Circuit Court of Appeals in the instant case aptly stated this procedural point in the following language in its position on the petition for rehearing (Rec. 259, 260):

> "Rule 50 (b) in our opinion applies only to cases where the matter is submitted to a jury for its independent voluntary consideration and verdict. Where the court directs a verdict for the plaintiff as in the instant case, the matter is not submitted to the jury for it to exercise its independent judgment on the facts. The court has exercised its judgment on a matter of law."

III.

The History, Purposes and Wording of Rule 50 of the Federal Rules of Civil Procedure Establish Beyond All Doubt That This Rule Does Not Apply to Directed Verdicts Where the Court Grants a Motion for a Directed Verdict Without Submitting the Case to the Jury for Its Independent Determination As to the Facts.

The very title of Rule 50(b), "Reservation of Decision on Motion", establishes that this rule applies only wher the trial court reserves its decision on a motion for a directed verdict. Before the Federal Rules of Civil Procedure were adopted there is no question but that Circuit Courts of Appeals then had the power to reverse judgments of trial courts and enter final judgment for appel-

lants in cases involving questions of law only, where the trial court had entered a judgment for the appellee on its motion for directed verdict, without submitting the case to the jury for its independent judgment on the facts, and where the appellee's case had been fully developed in the trial. Obviously, Rule 50 of the Federal Rules of Civil Procedure was not intended to curtail or cut down this inherent, historical and statutory power of Circuit Courts of Appeals.

One of the chief purposes of Rule 50 (b) was to automatically reserve the legal questions involved by a motion for a directed verdict so that the motion can be passed on after a verdict is returned by the jury that uses its independent judgment to pass on the facts. In *Berry* v. *U. S.*, 312 U. S. 450, cited in *Cone* v. *West Virginia Pulp & Paper Company*, this court said, "Rule 50 (b) goes further than the old practice in that district judges, under certain circumstances, are now expressly declared to have the right, but not the mandatory duty, to enter a judgment contrary to the jury's verdict without granting a new trial." In this *Berry* case the trial court permitted the case to go to the jury for its independent determination of the facts.

Prior to the adoption of the Federal Rules of Civil Procedure this court decided *Baltimore & Carolina, Inc.* v. *Redman*, 295 U. S. 654. In that case the defendant's motion for a directed verdict was denied by the trial court and the case went to the jury. The Circuit Court of Appeals reversed the judgment of the trial court because, as a matter of law, the evidence was insufficient to sustain the verdict, and this court held that the Circuit Court of Appeals had the power to embody a direction for a judgment of dismissal on the merits and not for a new trial, and that the judgment of dismissal would be the equivalent of a judgment for the defendant on a verdict directed in its favor. *In that case the de-*

fendant did not file a motion for a judgment in the trial court. That case contains a full discussion on the historic as well as the common law well established practice of reserving rulings on questions of law arising during jury trials, and of reserving rulings on motions for directed verdicts with the power to make ultimate disposition of the case.

When the Federal Rules of Civil Procedure were being drafted and discussed, this decision of *Baltimore & Carolina, Inc.* v. *Redman* was constantly referred to in the discussion involving the proposed rules, particularly in the discussion by Mr. William D. Mitchell, former Solicitor General of the United States. We must assume, therefore, that Rule 50 (b) was drafted in the light of the holding of the United States Supreme Court in *Baltimore & Carolina, Inc.* v. *Redman.* (Proceedings in Washington Institute on Federal Rules, 1938 p. 126 (last paragraph) p. 127 (first paragraph); New York Symposium on Federal Rules (1938), pp. 282, 283, 330; Cleveland Institute on Federal Rules (1938) p. 314.)

At page 16 of the petition for certiorari the petitioner cites *Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389. In that case the motions of both parties for a directed verdict were denied and the jury returned a verdict for the defendant. The plaintiff in that case filed a motion for a new trial but did not file a motion for judgment, notwithstanding the verdict. That case was decided before the adoption of the Federal Rules of Civil Procedure. The Circuit Court of Appeals reversed the judgment of the trial court and entered judgment for the plaintiff for the agreed amount of the fire loss in question. This court reversed the Circuit Court of Appeals and held that that court did not have the power to enter judgment for the plaintiff, and the case was remanded to the trial court for a new trial. The petitioner should have set forth

this court's reasons for that procedure and they are, first, that both parties abandoned their motions for a directed verdict by both requesting the trial court for special instructions to the jury; secondly, neither party requested the trial court to reserve its rulings on the motions for a directed verdict and to pass on the motions after the jury would return its verdict, and, lastly, under the Conformity Act, there was a Pennsylvania State statute applicable at the time which required the losing party in the trial court to file a motion for judgment notwithstanding the verdict to empower a reviewing court to enter judgment upon reversal on appeal in favor of the losing party in the trial court.

At page 16 of its petition for certiorari the petitioner correctly states one of the purposes of Rule 50 when it says;

> "One of the purposes of Rule 50 (b) was to avoid the constitutional questions involved in the *Slocom* case (*Slocom* v. *New York Life Ins. Co.*, 228 U. S. 364) by making automatic the reservation approved in the *Redman* case for the later determination of the legal questions raised by the motion for a directed verdict."

At page 4 of its petition for certiorari, under footnote 2, the petitioner cites *Halliday* v. *United States*, 315 U. S. 94; *Berry* v. *United States*, 312 U. S. 450, and *Conway* v. *O'Brien*, 312 U. S. 492. In each of these cases, as well as the *Cone* case, unlike the case at bar where the trial court directed a verdict for the petitioner, the trial court automatically reserved for later decision the legal questions involved by a motion for directed verdict and submitted the case to the jury under Rule 50(b) for its independent voluntary consideration and determination of the facts. In each of these cases the Circuit Court of Appeals reversed the judgment of the trial court and en-

tered judgment for the losing party in the trial court. In none of these cases did the losing party file a motion for judgment notwithstanding the verdict in the trial court.

In each of the *Halliday, Berry* and *Conway* cases this court reinstated the verdict of the jury in the trial court and the judgment thereon, and in the *Cone* case this court remanded it to the trial court for a new trial *before a jury.* In the case at bar questions of law only are involved, the facts are all undisputed, the petitioner's proof has been fully developed and introduced, and there is no element existing in the case of missing witnesses or a failure of the plaintiff to establish a missing element of proof.

In the Halliday, Berry and *Conway* cases, *even if the losing parties had filed in the trial court motions for judgment notwithstanding the verdict of the jury, nevertheless the Circuit Court of Appeals would still have been without power to reverse the judgments of the trial court and to enter judgment for the losing party in the trial court, because in each of these cases there were controverted questions of fact involved that had been or would have to be passed on by a jury because of the constitutional right to a trial by jury by the winning party in the trial court.* The decision of this court in those cases had no relation to Rule 50B.

An analysis of the very language of Rule 50(b) is so illuminating that it becomes self evident that this rule applies only to situations where the trial court, after a motion for directed verdict, has "let the case go to the jury," *i. e.,* submitted the case to the jury for its independent voluntary consideration and verdict. Rule 50 (b) is as follows:

"Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, *the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.* Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." (Italics ours.)

The italicized portion of the rule we have just quoted is the heart and crux of this rule. These italicized words would be meaningless if it was attempted to apply them to a situation where the trial court has granted a motion for a directed verdict in favor of one party without submitting the case to the jury. The very act of the trial court in granting a motion for a directed verdict without submitting the case to the jury is tantamount to an immediate determination of the legal questions raised by the motion for a directed verdict. The conclusion is therefore inescapable, that this pointed language in Rule 50 (b) establishes that the rule can only apply to cases where the trial court reserves its ruling on the legal questions involved in motions for a directed verdict, and submits the case to the jury for its independent voluntary

determination of the facts. The last sentence in Rule 50 (b), which reads, "If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial," also makes provision for a situation where the jury does not return a verdict, as where it disagrees. (Hughes Federal Practice, p. 336.) This last sentence also illustrates that the entire Rule 50 (b) contemplates the trial court submitting the case to the jury for its independent voluntary consideration and determination of the facts.

Since we believe we have demonstrated beyond doubt that Rule 50 (b) does not apply where the trial court takes the case from the jury and grants a motion for a directed verdict without submitting the case to the jury, the requirement under that rule for the losing party in the trial court to file a motion for judgment notwithstanding the verdict, has no application to the case at bar.

IV.

The Final Order Entered By the Circuit Court of Appeals in the Instant Suit for Judgment in Behalf of the Respondents Is Not in Conflict With the Decision of This Court in the Case of Cone v. West Virginia Pulp & Paper Co.

In the case at bar, all of the facts are undisputed and were fully developed in behalf of the petitioner; no evidence was improperly admitted in the trial court in behalf of the petitioner and questions of law only were involved. In the *Cone* case, the facts were controverted and still required a trial by jury, the plaintiff's proof as to possession was insufficient, leaving the inference that the plaintiff might introduce sufficient proof at a new trial, and evidence was improperly admitted in the trial court in behalf of the plaintiff.

It is important to note the portion of the opinion of this Court in the *Cone* case that evidence was improperly admitted in behalf of the petitioner by the trial court. No such situation exists in the case at bar. No point was made in the instant suit that the trial court improperly admitted any evidence in behalf of the petitioner. Accordingly, in the *Cone* v. *West Virginia Pulp & Paper Co.* case, in order to relitigate the entire case and permit the petitioner one more chance to introduce, if it can, proper and sufficient evidence to *supplant* the petitioner's evidence that was *improperly* admitted, this Court held that the case should be remanded to the trial court so that it can "exercise a discretion" to either order a new trial or direct the entry of judgment as if the requested verdict had been directed. We repeat that no such situation exists in the case at bar. There exists no improper evidence that was introduced in behalf of the petitioner which requires substitution or correction.

The opinion of this Court in the *Cone* case indicates the qualified and limited effect of this decision. The whole tenor of the decision illustrates that it only applies in cases that are *still potential jury cases,* or where, to prevent a miscarriage of justice, a party should be given another chance to prove his case or, in the discretion of the trial court, a party should even be permitted to take a non-suit.

None of these elements exist in the case at bar, as the petitioner's proof was fully developed, there were no disputed questions of fact, there is not present in the case a situation where the petitioner has been handicapped by the failure of missing witnesses to testify, only questions of law are involved and the petitioner does not require a new trial to supplant any improperly introduced evidence in the trial court as none was introduced in its behalf.

There exist no circumstances, nor could any exist, which would require the trial court to exercise any discretion as to the factual issues involved or the kind of evidence given or any impression made by any witnesses. No circumstances exist which require any further trial in the instant suit.

The opinion of the Circuit Court of Appeals points out correctly, we believe, that the *Cone* decision is not applicable to the case at bar. The following excerpts of the opinion of the Circuit Court of Appeals are pertinent:

> "The Supreme Court did not hold that if such a motion had been made and overruled, the Circuit Court of Appeals could not have directed, if warranted in law, the District Court to sustain the motion of the defendant for a directed verdict. Nor did the Supreme Court hold that a Circuit Court of Appeals may never dispose of a case where only errors of law are involved. Rule 50(b) was adopted for the purpose of reserving automatically to the District Court the right to pass on a motion for judgment notwithstanding the verdict, even though it had denied a motion for a directed verdict and had submitted the case to the jury. *Ryan Distributing Corporation* v. *Caley*, 147 F. 2d 138, 142. Before this rule was adopted the case of *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636, had required the court to expressly reserve that right. To avoid the *Redman* case, Rule 50(b) was adopted.
> • • •
>
> "Where the court, as in the instant case, has sustained the motion of the plaintiff for a directed verdict, the legal consequence is the same as if the District Court had submitted the case to the jury, the jury had returned a verdict for the plaintiff, and the

District Court had overruled the motion of the defendants for judgment notwithstanding the verdict. * * *" (Rec. 256-260)

We believe it is also evident that in the *Cone* case even if the petitioner in that case had made a motion for judgment notwithstanding the verdict, the Circuit Court of Appeals would have been without power to reverse the judgment of the trial court and enter a judgment for the respondents, as the case was still potentially a case that required a trial by jury. This is not the situation in the case at bar where questions of law only are involved on undisputed facts fully developed by the petitioner.

We believe that the holding of the Circuit Court of Appeals in the instant suit is not in conflict with the decision of this Court in *Cone* v. *West Virginia Pulp & Paper Co.*

V.

Where the Trial Court Directs a Verdict Without Submitting the Case to the Jury, the Court Has Exercised Its Judgment on a Matter of Law and the Rendition of a Verdict by the Jury is a Mere Formality.

Where a trial court exercised its judgment on a matter of law and grants a motion for a directed verdict without submitting the case to the jury, it is obligatory for the jury to return the verdict directed by the court. The jury is not at liberty to refuse obedience to the court's direction and the signature of the jury to a verdict is a mere matter of form. The rendition of a verdict by the jury as directed by the court is a mere formality, the decision, in effect, being one of law by the court. A directed verdict requires no jury action in order to be valid. It is obligatory on the jury to return the verdict directed by the court; they are not at liberty to refuse obedience to

the court's direction (64 C.J. Pages 503-504, Notes 31, 38, 39, 40; 26 R. C. L. 1066, Note 14).

In *Bryan* v. *Louisville N. R. R. Co.*, 244 Fed. 650 (Cert. denied 246 U. S. 651), an instructed verdict was held properly entered when the verdict itself was only signed by the foreman.

In the recent Illinois Supreme Court case of *Johnson* v. *Bennett*, 395 Ill. 389, 69 N. E. (2d) 899, that court in commenting on the effect of a directed verdict stated:

> "It was held in the case of *Kinser* v. *Calumet Fire Clay Co.* 165 Ill. 505, that a peremptory instruction to find for the plaintiff was, in effect, taking the case from the jury. When the court directs a verdict an issue of law is raised on the whole case, and there is no fact for the jury to find. When the court directs a jury as to the verdict to be returned, it is not necessary that a verdict be actually written out and signed by the jury and returned to the court, it being entirely within the control of the court and a question of law with which the jury has nothing to say. The question involved is whether or not the court erred as a matter of law in giving the instruction."

At page 11 of its Petition for Certiorari, in a footnote, the petitioner poses a supposed paradox in procedure where it indulges in a bit of sophistry in wondering how the Circuit Court of Appeals can instruct a District Court to direct a verdict where the jury has already been discharged. The obvious answer to this quibbling is to propound a question to the petitioner. Suppose in the instant suit the respondents had filed a motion for judgment notwithstanding the verdict. It is obvious that the trial court would have promptly denied that motion. Wouldn't the Circuit Court of Appeals have had the unquestioned power under those circumstances to pass on matters of law and make a final disposition of the case? The mere

asking of this question carries with it the affirmative answer. Following the technical point raised by this so-called paradox to its absurd conclusion, assuming, (but not conceding) that it would be necessary for a jury to go through the needless ritual of signing a verdict because of the mandate of the Circuit Court of Appeals, all a trial court has to do is to empanel a new jury and direct that jury to return a verdict in accordance with the mandate of the Appellate Court. A complete answer to this supposed paradox is that where the trial court grants a motion for a directed verdict on questions of law or the Appellate Court by its mandate directs the trial court to enter a motion for a directed verdict on questions of law, the case becomes, in effect, a trial by the court without a jury.

VI.

The Facts.

A Summary of the Undisputed Leading Facts Establishes That Questions of Law Only Were Involved in the Instant Suit. Even If the Questioned Portions of the Deposition of Todes Would Be Considered as Having Been Admitted in Evidence, the Undisputed Proof Establishes the Existence of a Disclaimer By the Respondents of Any Warranty as to the Goods, Whether Express Or Implied.

The summary of the facts in the case at bar contained in the petitioner's Petition for Certiorari is wholely inadequate and insufficient and omits many of the decisive and leading facts in the case.

The respondents were not the shippers of goods. The goods were shipped directly from a Mexican shipper in Mexico to the petitioner, and the respondents did not handle the goods (Rec. 97). The petitioner regarded the re-

spondents as agents or brokers in the transaction (Rec. 96; 106). Mr. Lazarus, the man who ordered the goods in behalf of the petitioner, was in the liquor business all his life and he was presumably familiar with the mechanics of shipments of liquor from foreign countries to the United States. The petitioner was so anxious to have its order for the goods accepted that it paid Todes, the salesman for the respondents, a separate or "finder's" commission of $750.00 (Rec. 96). Plaintiff's Exhibit 2, being a letter from the respondents' salesman to the petitioner, dated March 24, 1944, stated that the salesman had advised the respondents to cable the order to Mexico (Rec. 179).

The contents of the letters of credit furnished by the petitioner to pay for the merchandise established that the petitioner was in direct privity with the Mexican shipper in the transaction. The letters of credit (Plaintiff's Exhibit 4; Rec. 180-181) required the production of the following title and shipping documents before payment would be made under the letters of credit: (1) Mexican shipper's commercial invoice; (2) Consular invoice in duplicate; and (3) Original bill of lading issued to order of Mexican shipper, blank endorsed, evidencing shipment of 750 cases of Tequila to Laredo, Texas.

Accordingly, the title and shipping documents were to be sent directly by the Mexican shipper to the petitioner, which proved the direct relationship between the two.

It has been held as a matter of law that "invoices" are written itemized accounts sent to a purchaser by a seller of merchandise. (*Merchants Exchange Co.* v. *Weisman,* 93 N. W. 869, 870; *Southern Express Co.* v. *Hess,* 53 Ala. 19, 22; *State* v. *Standard Oil Co.,* 271 N. W. 185, 187).

The letters of credit also provided that they could be assigned and that drafts drawn against the letters of credit would be payable at The First National Bank of Chicago. The letters of credit were assigned and payment thereunder was made to The First National Bank of Chicago. Payment under the letters of credit was not made to the respondents, nor did they handle the proceeds representing the payment of the goods.

When the goods arrived in the United States and were inspected by the United States Food and Drug Administration, the examination showed that slightly more than ten per cent of the bottles of Tequila showed the presence of particles of glass (Rec. 188). *As soon as this was brought to the attention of the Mexican shipper, he promptly agreed by telegram to the petitioner to recondition the goods at his, the shipper's own expense* (Rec. 104). This offer was ignored by the petitioner.

It is common knowledge that during 1944, frequent shipments of alcoholic beverages from foreign countries into the United States contained bottles made of defective materials that caused glass particles to become loose in the beverages. The Food and Drug Administration granted conditional entry to such goods and released them when they were filtered and rebottled under United States Government supervision. In the 1944 annual report of the Food and Drug Administration, the following statement appears at page 9 of the report:

> "Following discovery by California State officials in March, 1944 that storage stocks of bottled brandy from Portugal contained glass ranging from microscopic particles to long, jagged-edged slivers, nearly a half million cases of imported brandy, wine, rum, and other liquors were detained at ports of entry before the end of June. The glass apparently came from carelessly handled bottles made of defective ma-

terials. Shipments from Portugal, Spain, Uruguay, and Chile were involved. Where glass was the only contaminant, conditional entry was granted for candling, bottle by bottle, with release of those free from glass and straining of those showing glass present. Members of the industry in all affected countries are taking control measures to obviate future detentions."

Had the petitioner accepted the offer of the Mexican shipper to recondition the goods at his expense, the original transaction of sale would have been fully performed and no one would have been damaged. We believe that the opinion of the Circuit Court of Appeals in the instant case was correct in holding, in effect, that there was direct privity between the petitioner and the Mexican shipper, and it so held in the following portion of its opinion:

"Neither can it be contended that the sale was not executed by delivery of the goods conditionally to the plaintiff. The plaintiff agreed to a conditional delivery and to accept such conditional delivery by agreeing to the shipment of the goods C.I.F. Laredo, Texas, on a bill of lading made to the order of the shipper, Gonzalo A. Larrea, and endorsed by the shipper in blank, and the goods to be shipped in bond subject to the right of the United States Customs Officers to inspect and accept or refuse admission of the goods to this country. When the plaintiff, with the letter of credit which it had authorized, took up the bill of lading under such circumstances, the sale was executed, and the title to the goods passed to the plaintiff. In any view of this case the court erred in sustaining the motion of the plaintiff for a directed verdict and also erred in overruling the motion of the defendants for a directed verdict." (Rec. 258-259.)

The amended answer of the respondents filed in the trial court set up the following agreement between the parties at the time the order was given for the goods:

"* * *; that the defendants, not being in the liquor business or having an importer's license, and

> not handling said merchandise in any manner, were not to be personally liable for the shipment of said liquor or its quality; that the time of shipment and quality of the merchandise would be the responsibility of the shipper in Mexico and not the defendants, • • •" (Rec. 12.)

This amended answer notified the petitioner in advance of the trial of the respondents' defense that they refused to warrant the goods in any manner because they were acting as agents in the transaction.

The existence of this disclaimer of warranty was proved by the admission of Mr. Lazarus, Vice President of Globe Liquor Company, petitioner, who ordered the goods. In the single but potent fragment of the deposition of Todes that the trial court permitted to be introduced in evidence, Todes testified that he spoke to Mr. Lazarus after the goods were detained and that Mr. Lazarus told Todes:

> "I agree that the shipper is responsible for it." He said, "We want our money back." He said, "I am not saying that it is your fault but it is the shipper's fault." (Rec. 154.)

The trial court excluded practically the entire deposition of Todes on the motion of the petitioner. This small fragment of evidence was permitted by the trial court to stand as being introduced in evidence (Rec. 154, Lines 19-24). This was a clear admission by Lazarus that he understood and agreed that when his firm bought the goods the respondents disclaimed any responsibility as to anything concerning the goods and that this was the shipper's responsibility.

The Circuit Court of Appeals was mistaken in stating in its second opinion when it denied the petition for rehearing that the entire deposition of Todes was excluded by the trial court. However, the petitioner was almost

successful in its efforts to exclude the entire deposition. but this one small fragment, and the most important one, relating to the admission of Lazarus as to the absence of any warranty by the respondent was admitted in evidence.

At pages 17 to 21 of its Petition for Certiorari, the petitioner contends that a particular portion of Todes' deposition was introduced in evidence and that this established that the respondents were "dealers" under Section 15(2) of the Illinois Uniform Sales Act. Before the Todes deposition was read, the respondents' attorney told the trial court that he was about to read the deposition of Todes. Todes had previously been identified by Lazarus as the salesman for the respondents. Previously the trial court ruled that practically the entire deposition of Todes was excluded, except this important admission of Lazarus. As counsel for the respondents was about to read the entire deposition to the trial court, petitioner's counsel objected to the reading and asked that the jury be excluded (Rec. 144). Then the following colloquy occurred:

> "By Mr. Heineman: I thought you were going to present it to his Honor.
>
> "By Mr. Kahn: *No, on the parts which you object to, and I will read those into the record now.*
>
> "By Mr. Heineman: All right. Starting on page: 6:
>
> " 'Q. What were his oral instructions to you relative to the taking of orders or selling of merchandise in his behalf?' " (Italics ours).

The first objection to the deposition was made immediately after this last quoted question. The portion of the Todes deposition described at pages 17 and 18 of petitioner's Petition for *Certiorari* preceded the first question in the deposition to which objection was made by the petitioner. Inadvertently, neither counsel read to the court

the preceding portion of the deposition prior to the first objection. In other words, the only parts of the deposition that were read or considered by the court were those parts to which the petitioner made objection, and the petitioner objected to almost all of the questions propounded to the witness on direct examination. However, for the purpose of considering this Petition for *Certiorari*, it may be considered that those portions of the deposition of Todes contained at pages 17 and 18 of petitioner's Petition were introduced in evidence. This particular portion of the deposition does not prove that the respondents were dealers or principals in other transactions. The status of the respondents in these other transactions does not appear in this particular portion of the proof but in the transaction in the instant suit, it is undisputed that the respondents did not act as dealers, sellers or principals but merely as agents or brokers in the transaction, and the petitioner, through its Vice President, Lazarus, admitted several times in his testimony that he dealt with the respondents as agents or brokers.

The admission of Lazarus (Rec. 154) established, in effect, a disclaimer of any warranty of the goods by the respondents, even if it is assumed, but not conceded, that the respondents were the principals or sellers in the transaction and not the agents or brokers.

In the trial court, considerable proof offered by the respondents was excluded by the trial court. However, it is unnecessary to consider this excluded proof offered by the defendants.

It was necessary for the respondents in this brief to go into the facts with some detail in order to lay the foundation for the next point, namely, that the grounds of the respondents' motion for a directed verdict were fully stated in the trial court.

VII.

The Motions of the Respondents for a Directed Verdict Were Sufficient and Adequate. These Motions Included the Previous Arguments of the Respondents Throughout the Case and Both the Motions and the Previous Arguments Included the Basis of the Reversal and Entry of Judgment for the Respondents by the Circuit Court of Appeals.

At the conclusion of the petitioner's case, the respondents made an oral motion for a directed verdict. They argued it at length and the motion was denied by the trial court (Rec. 116-120).

The petitioner, at the conclusion of all of the evidence, made an oral motion for a directed verdict without giving any grounds therefor, and this motion was promptly allowed by the trial court (Rec. 173, 176). Yet, the petitioner, in a classic illustration of the pot calling the kettle black, complains that the respondents' motion for a directed verdict was not based on adequate stated grounds. This contention is erroneous.

In their amended answer, the respondents set forth their disclaimer of any warranty (Rec. 12, Lines 20 to 24). This exoneration of personal liability of the respondents as to quality is the exact equivalent of an express refusal by the respondents to warrant the quality of the goods, and negatives the existence of an implied warranty under Section 71 of the Uniform Sales Act (1945 Ill. Rev. Stats. Ch. 121½, Par. 71, Page 2960).

In their opening statement, the respondents again mentioned their refusal to warrant the goods (Rec. 55, Lines 19-26).

At the conclusion of all of the evidence in the case, the respondents presented their written motion for an instructed verdict. (Rec. 202) This written motion and the matters therein specified should be interpreted in the light of the various defenses and points that had been previously argued fully by the respondents during the course of the trial and in support of their first and oral motion for an instructed verdict which was made at the conclusion of the petitioner's case.

Even though Rule 50(a) of the Rules of Civil Procedure provides that a motion for directed verdict shall state the specific grounds therefor, technical precision need not be observed in stating the grounds for such motion. It is sufficient if the grounds are sufficiently stated to apprise the trial court clearly as to movant's position with respect to the motion (18 Hughes Federal Practice (1940), Sec. 24403).

The respondents' written motion for an instructed verdict at the conclusion of all the evidence should be construed with the previous oral argument of the respondents in support of their oral motion for an instructed verdict at the conclusion of the petitioner's case, and both the motions and the arguments and reasons in support thereof should be construed together (*Dawson* v. *McWilliams*, 146 F. (2d) 38; *Pickering* v. *Corson*, 108 F. (2d) 546.)

Although the agency phase of the case may have been stressed in paragraphs numbered 1 and 2 in respondents' written motion for an instructed verdict (Tr. 202), these specific grounds should be construed with the previous defense of the respondents set forth in their amended answer and mentioned throughout the trial of the case, that they were not liable to the petitioner in the transaction because of the respondents' disclaimer of warranty

because of their disclosed agency status in the deal. This factor by itself also negatived any express or implied warranty by the respondents. This point was argued in the trial court prior to the presentation of the written motion for a directed verdict (Rec. 127).

In view of Lazarus' admission that the respondents did not warrant the goods, and the repeated references to this disclaimer of warranty by the respondents during the arguments throughout the trial, the third ground in the respondents' written motion for a directed verdict must be construed to mean that even if a warranty as to quality existed, it was not breached by the fact that a small proportion of the bottles were defective, particularly since the shipper offered to recondition the goods.

In the oral argument in the trial court by the respondents, in support of their oral motion for a directed verdict at the conclusion of the petitioner's case, the respondents mentioned the following factors: The admission of Lazarus that he regarded the respondents as brokers (Tr. 117); the admission of Lazarus that the shipment was to be made directly from Mexico (Tr. 117, 118); respondents' contention that the petitioner was in privity directly with the shipper in Mexico (Tr. 117, 118); and the admission of Lazarus that Larrea, the shipper, agreed to filter and recondition the merchandise at his own expense (Tr. 118). During this same argument the respondents mentioned their disclaimer of warranty contained in the Todes deposition on file (Rec. 127, lines 4-8).

The purpose of Rule 50(a) of the Federal Rules of Civil Procedure requiring that a motion for a directed verdict shall state the specific grounds therefor is to apprise the other party of any possible defects in his proof so that he may supply any missing parts or correct erroneous portions of the same. However, it has been

held in the cases heretofore cited in this section that the oral arguments in the case previous to the time motions for a directed verdict are made should be considered as parts of the grounds of the motions for directed verdicts. Under Rule 7(b) of the Federal Rules of Civil Procedure, a motion made during a hearing or trial need not be in writing but can be oral. Accordingly, the detailed oral arguments of the respondents in support of their motions for directed verdicts should be considered as parts of the grounds for their motions.

The refusal of the respondents to warrant the goods in any manner was repeatedly mentioned in these previous arguments, so that the existence of any warranty, express or implied, was denied by the respondents and forcibly brought to the attention of the petitioner. The petitioner's original complaint relied solely on an express warranty. Not an iota of proof was offered by the petitioner in support of this alleged express warranty and the Circuit Court of Appeals properly held that no recovery could be made when there was a total failure of any proof as to this express warranty (*Beckett* v. *F. W. Woolworth Co.*, 376 Ill. 470, 473; 34 N. E. (2d) 427).

Even if the petitioner had in its complaint alleged the existence of an implied warranty, the petitioner did not prove the same, as it is undisputed that the petitioner dealt with the respondents as agents or brokers and not as principals or dealers, and the respondents' refusal to warrant the goods negatived the existence of any implied warranty.

VIII.

Disclaimer of Warranty

The Admission of Lazarus, Vice-President of the Globe Liquor Company, Petitioner, That the Mexican Shipper Was Responsible for the Condition of the Merchandise and that the Quality of the Goods Was Not the Fault of the Respondents Established that the Goods Were Bought With the Understanding that the Respondents Disclaimed Any Warranty, Express or Implied, as to the Goods.

Section 71 of the Illinois Uniform Sales Act (Ill. Rev. Stats. 1945, Chapter 121½, Par. 71, page 2960) provides that the parties may expressly negative the existence of an implied warranty. This statute is declaratory of the common law. (*Chicago Mills* v. *Berthold Stern Flour Co.* 247 Ill. App. 1)

The admission of Lazarus that the Mexican shipper was responsible for the condition of the goods and that the condition of the goods was not the fault of the respondents (Rec. 154), established that at the time the goods were ordered by the petitioner, the latter understood that the respondents expressly refused to warrant the goods under either an express or implied warranty.

In ascertaining the meaning of a contract, the construction that the parties themselves have placed upon it is of prime importance. "No extrinsic aid can be more valuable" (*Slack* v. *Knox*, 213 Ill. 190, 194.)

For the purpose of discussion of this point, we will assume (without conceding) that the respondents were the sellers, that is, the principals in the sale. Where the seller "gave no warranty" or refused to assume "responsibility" for the condition of goods, or "did not war-

rant the property in any manner," or where the seller used similar language, it has been repeatedly held that such language establishes a refusal of the seller to warrant the quality of the goods and a disclaimer of any warranty, express or implied as to the merchandise. Leading cases illustrating and following this principle are:

Gilcrest Lumber Co. v. *Wilson*, 121 N. 989.
Crampton v. *La Monda*, 114 Atl. 42, 43.
Monroe v. *Hickox*, 107 N. W. 719.
Bridget L. A. W. Corp. v. *Levy*, 147 Atl. 842.
Lynch v. *Curfman*, 68 N. W. 5.
Fruit Dispatch v. *Taft Co.* 197 N. W. 302.
Cody & Edgar v. *Automobile Finance Co.*, 140 S. E. 634.
Payne v. *Chall-Max Motor Co.*, 104 S. E. 453.
Potter v. *Shields*, 140 N. W. 500.
Branch v. *Peddy*, 60 S. E. 1027.
Nemeth v. *Becker Roofing Co.*, 151 S. W. (2d) 559.
Rockwood v. *Parrott & Co.*, 19 Pac. (2d) 423.
Marks v. *Kucich*, 42 Pac. (2d) 16.
Dollen v. *Miller Tractor Co.*, 241 N. W. 307.
Case Threshing Co. v. *McClamrock*, 67 S. W. 991.
Harrell v. *Holman*, 9 S. E. 1021.
Cason v. *Jordan*, 145 S. E. 537.
Crossan v. *Noll*, 120 S. W. (2d) 189.
Blizzard Bros. v. *Growers Canning Co.*, 132 N. W. 66.
Getzoff v. *Von Lengerke Buic Co.*, 187 Atl. 539.
Hopkinsville Motor Co. v. *Massie*, 15 S. W. (2d) 423.
Jones v. *Love*, 21 S. E. 254.

IX.

Dealer to Dealer Sales

When Food or Beverages Are Sold By One Dealer to Another Dealer and the Sale Does Not Contemplate the Immediate Consumption of the Food or Beverage by the Buyer But the Goods Are Bought for Resale By the Buyer, There is no Implied Warranty by the Seller as to the Merchantability or Quality of the Goods.

The petitioner was an importer and wholesaler of wines and liquors and bought liquor for resale to other dealers. (Rec. 62). Even if we disregard the agency defense in this case for the moment and assume, without conceding, that the defendants were the principals, the sellers in the transaction, there can be no implied warranty as to quality of the goods in the instant suit, because it would then be a sale from one dealer to another whereby the latter bought for resale and not for the buyer's immediate consumption of the goods. This basic rule under the common law has not been changed in any respect by the Uniform Sales Act.

Even if Todes had not testified in the case and the proof did not include any disclaimer of warranty of any kind, it must follow from the settled authorities that in a sale of food or beverages from one dealer to another as a commercial transaction and not for the purpose of the buyer consuming the goods, there is no implied warranty as to the quality or fitness of the goods. This has been decided time and time again, and in support of this decisive point we submit the following authorities:

22 Am. Jur. 895, "Food", Sec. 109, Notes 3, 4 and 5.

Piper v. *Oppenheimer*, 158 S. W. 777.

Wiedeman v. *Keller*, 171 Ill. 93, 98, 99.

Whipple v. *Sherman*, 200 N. Y. S. 821.
Pelletier v. *Dupont*, 128 Atl. 186, 39 A. L. R. 972.
Cole v. *Branch*, 285 S. W. 353.
Tomlinson v. *Armour & Co.*, 65 Atl. 883.
Reed & Rea v. *Patterson Co.*, 54 S. W. (2d) 695.
Hanson v. *Hartse*, 73 N. W. 163.
Cotton v. *Reid*, 54 N. Y. S. 143.
Warren v. *Buck*, 42 Atl. 979.
Nelson v. *Armour Packing Co.* 90 S. W. 288.
Swank v. *Battaglia*, 164 Pac. 705.
Howard v. *Emerson*, 110 Mass. 320.
Jax Beer Co. v. *Schaefer*, 173 S. W. (2d) 285.
Anheuser Busch, Inc. v. *Butler, et al.*, 180 S. W. (2d) 996.
2 Mechem on Sales, Secs. 1356, 1357.
Tiedeman on Sales, Sec. 191.
Houk v. *Berg*, 105 S. W. 1176.
Warren v. *Beck*, 71 Vt. 41.

X.

Latent Defects

No Implied Warranties of Any Kind Exist in Sales By One Not a Manufacturer As to Latent Defects, Which Can Be Discovered Only By Tests.

This reasonable rule has not been changed by the Uniform Sales Act, which does not cover this precise point.

It has been repeatedly held that where the vendor is not a manufacturer of the goods and the purchaser knows this fact, that the seller is not responsible for nor is there any implied warranty as to latent defects. Cases following this rule are:

U. S. Fidelity & Guaranty Co. v. *Western Iron Stove Co.*, 220 N. W. 192.

55 C. J. 749, note 36.

46 *Am. Jur.* p. 560, Sec. 380.

Ehrsam v. *Brown*, 91 Pac. 179, 184, 185.

Kroger Grocery Co. v. *Lewelling*, 145 Sou. 726.

Scruggins v. *Jones*, 269 S. W. 743.

McMurray v. *Vaughans*, 157 N. E. 567.

Pennington v. *Cranberry Fuel Co.* 186 S. E. 610

Great Atlantic & Pacific Co. v. *Walker* 104 S. W. (2d) 629.

Mountain Iron & Supply Co. v. *Bender*, 32 F. (2d) (242).

Piccoli v. *Paramount Lubricants Co.*, 250 Pac. 149.

Coleman v. *Simpson*, 143 N. Y. S. 588.

Oil Well Supply Co. v. *Hopper*, 282 Pac. 701.

Crandall v. *Stop & Shop Co.*, 288 Ill. App. 543.

In many of these cases just cited, the court emphasizes the equal knowledge or lack of knowledge of the parties regarding the condition of the goods. In many of the cases the court stresses that the seller did not handle the goods, but that they were shipped directly to the buyer in original containers by the manufacturer or producer.

Several of the cases just cited involve the sale of food or beverages. The defects in the goods in the suit at bar were latent defects that could not have been discovered by ordinary inspection, even if the respondents would have been dealers and had possession of the goods.

Since the respondents never saw or handled the goods, the principle, negativing the existence of implied warranties of any kind as to latent defects, is applicable with all its force in the instant suit.

XI.

Express Warranty Excludes Implied Warranty.

The Alleged Existence of an Express Warranty Must Necessarily Exclude Any Implied Warranty as to the Same Subject Matter. An Action Cannot be Maintained on Both an Express and Implied Warranty as to the Same Factors.

The entire theory of implied warranties is based on the reliance of the buyer on the seller's skill or judgment in choosing the goods. The petitioner's complaint as originally filed relied only on the existence of an alleged express warranty.

The alleged existence of an express warranty must necessarily exclude any implied warranty as to the same subject matter. An action cannot be maintained on both an express and implied warranty as to the same factors.

An express warranty follows because of the refusal of the buyer to buy, unless the seller makes an actual express warranty, that is to say, unless the seller makes written or oral representation as to quality, etc. An express warranty presumes the seller's knowledge of the condition and quality of the goods, and also assumes the buyer's reliance on the seller's skill, choice or selection of the goods. On the other hand, a claim on an implied warranty is not predicated on any reliance by the buyer as to any of those factors which exist when an express warranty is made. Consequently, an express warranty is inconsistent with an implied warranty as to the same factors.

The petitioner's complaint as originally filed is an admission or evidence against it that constitutes proof of the petitioner's deliberate refusal to rely on any implied

warranty. The petitioner's whole case when it introduced its proof and at the conclusion of all the proof in the case, relied on an express, that is to say, a special warranty. Not an iota of evidence was introduced in support of any express warranty. Therefore, under the Illinois Supreme Court case of *Beckett* v. *F. W. Woolworth Co.*, 376 Ill. 470, 34 N. E. (2d) 427, the petitioner could not recover under an express warranty.

The inconsistencies and contradictions between express and implied warranties as to the same subject matter has been firmly established and has not been changed by the Uniform Sales Act. Section 15(6) of the Sales Act (Ch. 121½, Ill. Rev. Stat. (1945) par. 15, p. 2953) provides: "An express warranty or condition does not negative a warranty or condition implied under this Act, unless inconsistent therewith." This particular provision does not make any reference to the same "subject matter." This section of the Uniform Sales Act means that an express warranty as to one particular factor or element does not negative an implied warranty as to a different element or factor. For instance, an express warranty as to color, quantity, dimensions or weight does not exclude an implied warranty if one exists, as to quality or fitness.

The following authorities support the uniform and well settled rule that an express warranty in a contract excludes an implied warranty as to the same subject matter:

Nave v. *Gross*, 146 Ill. App. 104.
De Witt v. *Barry*, 134 U. S. 306.
Williston on Sales (1924), Sec. 239, P. 473.
Nichols v. *Hausberg*, 33 Pac. (2d) 198.
Young v. *Plattner*, 91 Pac. 1109.

Reid v. *Rea-Patterson Milling Co.*, 54 S. W. (2d) 695.

Felder v. *Neeves*, 136 S. E. 918.

Hunter v. *Sander*, 208 S. W. 422.

Hampton v. *Hill*, 84 S. E. 774.

Rainey v. *Simon*, 138 S. E. 41.

Black v. *Kirkland*, 155 S. E. 268.

Buckley v. *Advance*, 183 N. W. 105.

Simmons v. *Roanoke*, 107 S. E. 903.

Gauh v. *Nichols*, 107 S. W. 190.

46 Am. Jur. 516, Sec. 334.

In a number of the foregoing cases recovery was denied to buyers who pleaded the existence of an alleged express warranty but did not introduce evidence in support thereof and sought to rely on the existence of an implied warranty as to the same subject matter.

Where the buyer relies on an express warranty of quality or merchantability, he cannot recover on an implied warranty thereon. The alleged existence of an express warranty as to merchantability or quality in favor of the buyer is predicated on his lack of knowledge as to the goods and his conscious or deliberate refusal to buy the goods unless the seller expressly warrants their quality or merchantability so that the buyer actually and intentionally buys the goods in reliance on the express warranty. An implied warranty as to quality or merchantability of goods is not based on any actual deliberate or intentional express statement as to the goods by the seller, so that there is no actual or deliberate reliance by the buyer on any statements by the seller. An express warranty as to merchantability or quality of goods is therefore inconsistent with an implied warranty as to merchantability or quality of goods.

In the instant suit, since the petitioner was told that the respondents did not handle the goods and the petitioner did not rely on the skill, choice or selection of the goods by the respondents, under the uniform and settled authorities on this point, there can be no implied warranty of any kind in the transaction in the suit at bar.

XII.

The Decision of the Circuit Court of Appeals Was Just and Fair.

Had the Petitioner Accepted the Offer of the Mexican Shipper to Re-Condition the Goods at His Own Expense the Original Contract Would Have Been Fully Performed and No One Would Have Been Damaged.

The petitioner dealt with the respondents and recognized them as being agents or brokers. The trial court commented on Lazarus' testimony that he, Lazarus, referred several times to the broker status of the respondents (Rec. 106). Lazarus admitted receiving a telegram from the Mexican shipper whereby the latter agreed to filter and re-bottle the merchandise at his own expense (Rec. 104). The petitioner was so anxious to procure the merchandise that it *paid* Todes a separate finder's commission (Rec. 96). Had the petitioner accepted the offer of the Mexican shipper to re-condition the goods at his own expense, the contract would have been fully performed and no one would have been damaged. During the period in question foreign importations of liquor were frequently found to be defective and thousands of cases were reconditioned under United States Government supervision and released to the public.

The terms of the letters of credit proved that the petitioner requested the production of invoices, title and ship-

ping documents directly from the Mexican shipper. It must follow, therefore, from the terms of the letters of credit, coupled with Lazarus' admission that the petitioner regarded the respondents as brokers or agents, that the respondents were not in the category "of a seller who deals in goods of that description" under Section 15 (2) of the Uniform Sales Act of Illinois. However, regardless of the characterization of the sale, whether it is considered a sale by description or sale under a trade or patent name, when Lazarus told Todes: "I agree that the shipper is responsible for it. * * * I am not saying that it is your fault but it is the shipper's fault," this constituted conclusive proof that the petitioner bought the goods with the explicit understanding that the respondents refused to give any warranty as to the goods. The petitioner should live up to its bargain.

XIII.

No Implied Warranty As to Quality Where Goods Are Sold Under a Patent Or Other Trade Name.

The sale was for 750 cases Tequila described as "Mariachi Gold". "Gold" referred to the yellow color of the beverage. Mariachi is a trade or patent name. Both parties tried the case in the trial court with the understanding that Illinois law would govern the transaction (Rec. 127, 128, 130, 132, 169, 171).

In *Beckett* v. *F. W. Woolworth Co.*, 376 Ill. 470, at page 473, 34 N. E. (2d) 427, the Illinois Supreme Court said:

> "Section 15 of part 1 of the Sales Act (Ill. Rev. Stat. 1939, chap. 121½, par. 15, p. 2810), so far as pertinent, provides: (4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose. Since the mas-

cara was sold under its trade name, paragraph 4 of section 15 is applicable. *Peoria Grape Sugar Co.* v. *Turney*, 175 Ill. 631."

In *Santa Rosa-Vallego Tanning Company* v. *Kronauer*, 228 Ill. App. 236, the Court held that under Sec. 15 (4) of the Illinois Uniform Sales Act, where a sale of goods is made under a particular trade name, there is an implied warranty to deliver the identical article sold, *but there is no implied warranty of merchantability.* (See also *Negenfind* v. *Singer, et al.*, 227 Ill. App. 493)."

It therefore appears that the petitioner could not recover in this case on either an express or implied warranty as to quality, regardless whether the respondents are regarded as principals or agents, and even if the proof of disclaimer of warranty is disregarded.

XIV.

The Trial Court's Denial of Respondents' Motion for a New Trial Constitutes Exercise of Complete Discretion By Trial Court in the Instant Suit That No Further Hearing in the Case Was Necessary.

The respondents filed within ten days after the entry of the judgment on the directed verdict a motion in the trial court to set aside the verdict and judgment for a new trial. This motion had the same legal effect as a motion by the respondents for judgment notwithstanding the verdict would have had if filed in the trial court, assuming, but not conceding, that Federal Rule 50 (b) applied to the case at bar. The respondents' motion for a new trial permitted the trial court to exercise its discretion to choose between the alternative of either ordering a new trial or entering judgment for the respondents on their prior reserved motion for a directed verdict. When the trial court denied the respondents' motion for a new

trial it exercised its discretion in that regard. This court in the decision of *Cone* v. *West Virginia Pulp and Paper Company* pointed out that the respondent in that case made a motion for new trial on the ground of newly discovered evidence.

In the case at bar, the respondents filed a detailed motion for a new trial (Rec. 204). This motion for a new trial requested that the trial court should set aside the verdict and judgment. That motion specified many grounds, including the oft-repeated defense that the petitioner agreed to look only to the shipper for recourse for damages and not to the respondents, and this was the equivalent of the respondents' refusal to warrant the goods.

The several grounds set forth in the motion for new trial were set up as "factual" questions, although they were undisputed. The motion for new trial was a last attempt of the respondents in the trial court to salvage some sort of relief from the trial court. Had the motion for new trial been granted, that would have constituted a signal victory for the respondents, under the circumstances. The trial court had promptly denied the respondents' motion for a directed verdict at the conclusion of the petitioner's case and also at the conclusion of all the evidence in the case, and had instead entered a judgment on a directed verdict for the petitioner. Moreover, the trial court in practically every instance had ruled against the respondents on every question that was raised during the trial.

There was a hearing on the respondents' motion for a new trial, and it was promptly denied. The trial court then had precisely the same opportunity for "a last chance to correct his own errors without delay, expense, or other hardships of an appeal," as if the respondents had gone through the meaningless ritual of having filed a

formal motion for judgment. Consequently, under this very language in the *Cone* case, there exists no need in the case at bar to remand this case to the District Court for another chance for the trial court "to correct his own errors without the delay, expense, or other hardships of an appeal".

The trial court had already fully decided the respondents' contentions and the entire lawsuit, and concluded there was no need of a retrial, and that the respondents were liable. As a matter of law the Circuit Court of Appeals held the trial court was wrong, and that the petitioner had no case against the respondents, and we believe that the Appellate Court was correct in its holding.

No matter how many times this case may be tried, the contents of the letters of credit and the other documents prove beyond all doubt that the petitioner bought the goods directly from the Mexican shipper through the respondents as agents. Moreover, the undisputed admission of Lazarus negatived the existence of any express or implied warranty of the goods. That is the sum and substance of this entire lawsuit, and there is no need of a re-trial in this case in order to prove what has already been established without contradiction or dispute. The facts in the case were fully developed as to the petitioner's case and claim. Questions of law only were involved. The petitioner did not introduce any prejudicial evidence that requires supplanting or correction.

There are no circumstances, nor can any exist in the instant suit which would require a trial court to exercise any further discretion as to the issues involved, or the kind of evidence given and particularly the impression made by witnesses. Moreover, the petitioner has not been handicapped nor precluded from offering any evidence in its own behalf. The petitioner's entire proof is all contained in the record.

After a trial court has denied two motions for a directed verdict on behalf of a party and has denied a detailed motion for a new trial by the same party and has ruled consistently against that party during the trial, it borders on fantasy to expect the trial court, when a motion for judgment is made by the losing party, to expect the trial court to immediately and completely reverse itself and set aside the original judgment and enter judgment for the moving party.

Assuming, but not conceding that Federal Rule 50 (b) applies to the case at bar, respondents' motion for a new trial permitted the trial court to exercise its discretion to choose between the alternative of either ordering a new trial or entering judgment for the respondents on their prior reserved motion for a directed verdict. When the trial court denied the respondents' motion for a new trial it exercised its discretion in that regard.

XV.

CONCLUSION.

There is not present in this case a single question which justifies a review of this record by this Court, and the facts established by the undisputed evidence bar any recovery by the petitioner against the respondents. The decision of the Circuit Court of Appeals is the only just decision which could have been made on this record.

In our opinion, we believe that no special or important reason exists in this case, which should impel this court, in the exercise of a sound judicial discretion, to issue a writ of certiorari and we therefore request that this petition should be denied.

Respectfully submitted,

NAT M. KAHN,
Attorney for Respondents.

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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 205

GLOBE LIQUOR COMPANY, INC., A Corporation,
Petitioner,

vs.

FRANK SAN ROMAN and DOROTHEA SAN ROMAN,
Doing Business Under the Firm Name and Style of International Industries,
Respondents.

ADDITIONAL BRIEF FOR RESPONDENTS.

NAT M. KAHN
33 South Clark Street
Chicago 3, Illinois
Attorney for Respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 205

GLOBE LIQUOR COMPANY, INC., A Corporation,
Petitioner,

vs.

FRANK SAN ROMAN and DOROTHEA SAN ROMAN,
Doing Business Under the Firm Name and Style of
International Industries,
Respondents.

ADDITIONAL BRIEF FOR RESPONDENTS.

May It Please the Court:

The case involves questions of law only. In the various sections of our argument, we discuss the undisputed facts that were admitted in evidence by the trial judge, and also other proof that is preserved in the record that was not admitted in evidence during the trial. All of this excluded proof was offered by the respondents and was excluded by the trial judge on motion of the petitioner. All of the proof offered by the petitioner was admitted in evidence by the trial judge.

SUMMARY OF ARGUMENT.

1.

Introduction.

Questions of law only are involved as the petitioner admits that there is no conflicting evidence in the record.

The Circuit Court of Appeals was correct in holding that the entire deposition of Todes excluded from evidence by the trial judge.

Petitioner's claim of an implied warranty is an afterthought, and was first raised in the Circuit Court of Appeals after argument of case.

2.

Respondents' motion for a new trial empowered the Circuit Court of Appeals to make final disposition of the case.

Assuming, without conceding that Rule 50(b) of the Federal Rules of Civil Procedure applied to the case at bar, respondents' motion for a new trial gave the trial court "a last chance to correct his own errors without the delay, expense or other hardships of an appeal."

3.

The form and substance of the respondents' motion for a new trial was substantially the same as a motion for judgment notwithstanding the verdict.

Although in the *Cone* case the respondent made a motion for a new trial, it was restricted to the ground of newly discovered evidence. In the case at bar, the respondents' motion for a new trial was comprehensive and stressed the refusal of the respondents to warrant the goods.

4.

No part of Todes' deposition was properly admitted in evidence. The record is clear that the entire Todes deposition was excluded by the trial court.

5.

The history, purposes and wording of Rule 50(b) of the Federal Rules of Civil Procedure establish beyond all doubt that the rule does not apply to a directed verdict where the court grants a motion for a directed verdict without submitting the case to the jury for its independent determination of the facts.

6.

The final order entered by the Circuit Court of Appeals in the instant suit for judgment in behalf of the respondents is not in conflict with the decision of this court in the case of *Cone* v. *West Virginia Pulp & Paper Co.*

7.

The motions of the respondents for a directed verdict were sufficient and adequate. These motions included the previous arguments of the respondents throughout the case, and both the motions and the previous arguments included the basis of the reversal and the direction of the

entry of judgment for the respondents by the Circuit Court of Appeals.

8.

No implied warranty.

Even if petitioner's complaint had relied on an alleged implied warranty of quality, the petitioner failed to prove that the respondents were dealers of the goods, which is required under Section 15(2) of the Uniform Sales Act of Illinois.

9.

Petitioner's duty to minimize damages.

Had the petitioner accepted the shipper's offer to recondition the goods, the bargain of the parties would have been fully performed and no one would have been damaged.

10.

Parol Evidence Rule moot in the instant suit.

The entire deposition of Todes which the petitioner contended in the trial court violated the Parol Evidence Rule, was excluded by the trial court upon the petitioner's motion.

11.

Direct privity between the petitioner and the Mexican shipper.

12.

Petitioner's initial order required acceptance by the Mexican shipper. Until this acceptance occurred, either expressly or by shipment of the goods, the petitioner could have withdrawn its order without incurring any liability under its initial order or letter of credit that it procured.

13.

If the respondents were under a duty to furnish the petitioner the name of the Mexican shipper, this was done in apt time before the order was accepted by the Mexican shipper and before the petitioner incurred any liability under its initial order or letter of credit.

14.

Letter of credit only when acted upon, is irrevocable.

A letter of credit is an independent offer of the issuer to purchase shipping documents and the offer does not become a contract until payment thereunder is requested accompanied by the specified shipping or title documents attached, or the beneficiary performs some other act in reliance on the letter of credit.

15.

Disclosed agency status eliminates personal liability.

16.

The decision of the Circuit Court of Appeals was just and fair.

Had the petitioner accepted the offer of the Mexican shipper to recondition the goods at his own expense, the original contract would have been fully performed and no one would have been damaged.

17.

Conclusion.

ARGUMENT.

1.

INTRODUCTION.

We are taking the liberty of assuming that the prime question for decision in this Court is the procedural question as to whether Rule 50(b) of the Federal Rules of Civil Procedure applies to the instant suit where the trial court entered judgment on its instructed verdict without submitting the case to the jury for its independent, voluntary consideration and verdict. We are, therefore, discussing this procedural problem first, and later we comment on the facts and the propositions of law pertaining to this case raised by the petitioner's briefs.

We will demonstrate shortly that the Circuit Court of Appeals was entirely correct in holding in its opinion on the petition for rehearing by the petitioners, *that no part of the deposition of Todes, the salesman for the respondents, was ever admitted in evidence* (Rec. 258), *because it was excluded by the petitioner.*

The most important admission made by the petitioner is at page 8 of its additional brief, that there was "*no conflicting evidence* or evidence sufficient to support a verdict for the International." (Italics ours.) Thus the petitioner admits that the case at bar presented no controverted questions of fact, and that questions of law only were involved in the instant suit.

(For convenience, we will hereinafter designate the name of the respondents as "San Roman," which is the

appellation we used in our brief in opposition to the petition for certiorari.)

The Circuit Court of Appeals in its original opinion (Rec. 231), and in its opinion on the petition for rehearing (Rec. 257), pointed out that the plaintiff's complaint relied solely on a breach of an express warranty of quality and that the petitioner's proof did not contain,

> "one word or syllable in the written exhibits or in the oral testimony that the defendants ever agreed to deliver tequila 'in good merchantable condition, fit for human consumption.' In this state of total failure to prove an express warranty as alleged in the complaint, the court directed a verdict for the plaintiff. This was error." (Rec. 231)

In its opinion on the petition for rehearing, the Circuit Court of Appeals discussed the afterthought by the petitioner that it could recover on an implied warranty. This point was never raised by the petitioner in the trial court. The Circuit Court of Appeals, in its opinion on the petition for rehearing, in commenting on this contention of implied warranty, correctly stated:

> "No such view was taken in the briefs or in the argument. After the argument the plaintiff filed what it termed a supplemental memorandum in which (Rec. 257) it seemed to take this position for the first time."

In attempting to support its contention of an implied warranty, the petitioner cited parts of the deposition of Todes. The Circuit Court of Appeals correctly held that no part of the deposition of Todes was admitted in evidence by the trial court. In commenting on this maneuver of the petitioner, the Circuit Court of Appeals stated in its opinion on the petition for rehearing:

> "The trouble with this evidence is that it is not in the record and was kept out on the objection of the plaintiff. No part of the deposition was ever read or considered as read in evidence. No part of the dep-

> osition was ever admitted. There was some colloquy in the judge's chambers about the deposition, but nothing was ever done in open court about it. The Plaintiff makes the extraordinary suggestion to us that we consider the pleadings amended so as to declare on an implied warranty to conform to the evidence contained in a deposition excluded from the evidence on the objection of the plaintiff. The plaintiff will not be heard to claim the benefit of that evidence which it had had excluded. The plaintiff cannot be allowed to blow hot and cold after such a fashion. So there is in this record no evidence to support an implied warranty. There is a complete failure of proof either of an express or an implied warranty." (Rec. 258)

Questions of law only were involved in the instant suit as there were no disputed facts. The Circuit Court of Appeals had ample power to make a final disposition of the case on appeal in favor of the respondents. The grounds of the motion for a directed verdict in behalf of the respondents were fully and adequately stated and presented to the trial court not once, but repeatedly, and the respondents fully and substantially complied with that portion of Rule 50(a) of the Federal Rules of Civil Procedure which require that a motion for a directed verdict shall state the specific grounds therefor. Throughout the trial of the case in the trial court, the respondents kept insisting that they expressly refused to give any warranty concerning the goods. *The respondents kept insisting during the entire course of the trial that, because of their status as agents for the shipper in Mexico, and the further fact that the respondents did not see, handle or import the goods, and that they were not in the liquor business, they would not give any warranty concerning the goods.*

The petitioner was amply warned of the respondents' defense that they refused to warrant the goods. This repeated defense was contained in the respondents' opening

statement (Rec. 55, lines 19 to 26), their amended answer (Rec. 12, lines 20 to 24), their argument in support of their oral motion for a directed verdict at the conclusion of the petitioner's proof (Rec. 126, last 5 lines; Rec. 127, lines 1 to 8), the respondents' argument on the petitioner's motion to exclude the Todes deposition (Rec. 152, lines 29 to 37; Rec. 153, lines 1 to 4; Rec. 154, lines 21 to 24), the respondents' argument at the conclusion of all of the evidence when each of the parties made a motion for a directed verdict (Rec. 175, lines 13 to 17), and the defendants' motion for a new trial (Rec. 206, par. A). Although the precise words "disclaimer of warranty" or "refusal to warrant" were not used in presenting this defense; the language that was used was equivalent thereto, namely, that when the original order for the goods was given by the petitioner, it agreed with Todes, the salesman for the respondents, that the respondents "not being in the liquor business nor having an importer's license, and not handling said merchandise in any manner, were not to be personally liable for the shipment of liquor or its quality; * * *" (Resp. Am'd Ans., Rec. 12.)

Since plaintiff relied solely on an express warranty of quality, in view of the defendants' repeated defense that no warranty was given, the petitioner then had the burden or duty of proving, if it could, the existence of this alleged warranty. It failed completely as to this vital factor. The Circuit Court of Appeals was therefore correct in disposing of the case because of this failure by the petitioner to prove the existence of any alleged warranty by the respondents.

2.

Respondents' motion for a new trial empowered the Circuit Court of Appeals to make final disposition of the case.

Assuming, without conceding that Rule 50(b) of the Federal Rules of Civil Procedure applied to the case at bar, Respondents' motion for a new trial gave the trial court "a last chance to correct his own errors without the delay, expense or other hardships of an appeal."

We touched on this point at pages 40-43 of our original brief in opposition to the petition for certiorari.

The case of *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, is relied on heavily by the petitioner in support of its contention that the Circuit Court of Appeals did not have the power to make a final disposition of the case, because the respondents did not make a motion for judgment notwithstanding the verdict under Rule 50(b) of the Federal Rules of Civil Procedure.

In the *Cone* case, this court stated at page 216 of its decision, that the trial judge must be given an opportunity to exercise his judgment notwithstanding the vering a new trial or a judgment notwithstanding the verdict, and the trial judge is thus afforded "a last chance to correct his own errors without the delay, expense or other hardships of an appeal." See *Greer* v. *Carpenter*, 323 Mo. 878, 882, 19 S. W. 2d 1046, 1047."

It appears from the language used in Rule 50(b) that the trial court is given a last chance to correct his own errors by *either* a motion for a new trial or a motion for judgment notwithstanding the verdict. The very case cited by Your Honors in this last quotation, namely, *Greer* v. *Carpenter*, 323 Mo., 878, 882, 19 S. W. 2d 1046, 1047, points out that the functions of a motion for a new trial

and of a motion for judgment notwithstanding the verdict, are one and the same in so far as giving the trial court a last chance to correct his own errors without the delay, expense or other hardships of an appeal. In *Greer* v. *Carpenter*, the concluding paragraph of that opinion by the Supreme Court of Missouri states:

> "In *Maplegreen Co.* v. *Trust Co.*, 237 Mo. 350, loc. cit. 362, 141 S. W. 621, 624, we said: 'The office of a *motion for a new trial* is to gather together those rulings complained of as erroneous, and solemnly and formally present them, one by one, in black and white *to the judge, in order that he have a last chance to correct his own errors without delay, expense, or other hardships of an appeal.* This, on the theory that even a judge is entitled to a last chance—a *locus poenitentiae.*'" (Italics ours.)

This function of a new trial is a well settled principle of procedure and we may paraphrase it as another kind of "last chance" doctrine, and has been followed in many cases which include these authorities: *Fruit Supply Co.* v. *Chicago, B. & Q. R. Co.*, 119 S. W. (2d) 1010, 1011; *Bass* v. *Baltimore & Ohio Terminal R. Co.*, 145 Fed. (2d) 779, 781; *Saginaw Broadcasting Co.* v. *Federal Communication Commission*, 96 Fed. (2d) 554, 558; *Phelan* v. *Carey*, 23 N. W. (2d) 10, 12; *Fitzgerald* v. *Lane*, 126 S. W. (2d) 65, 70; *Koboski* v. *Cobb*, 297 Pac. 771, 772; *State* v. *Haid*, 38 S. W. (2d) 44, 51; *Utz* v. *Dormann*, 39 S. W. (2d) 1053.

The defendants' motion for a new trial (Rec. 204, 206) squarely called to the trial court's attention this paramount question of the absence of any warranty by the respondents because of their refusal to give any warranty concerning the goods (Rec. 206, par. (A)). This was a pointed reminder to the trial judge as to this important warranty factor and it was ignored by the trial judge.

In the motion for a new trial the respondents enumerated various issues as being "contested questions of

fact." However, the petitioner admitted at page 8 of its additional brief that there was no conflicting evidence in the instant suit. Therefore, it is plainly evident that this characterization in the motion for a new trial of contested questions of fact was a last-straw effort by the respondents to salvage at least a new trial from the trial judge. The trial judge ruled against the respondents on practically every ruling that he made during the course of the trial, and he then granted the petitioner's motion for a directed verdict without submiting the case to the jury. Although in the *Cone* case the respondents made a motion for a new trial, it was restricted to the ground of newly discovered evidence. In the case at bar, the respondents' motion for a new trial was comprehensive and stressed the refusal of the respondents to warrant the goods.

Thus, by the respondents' motion for a new trial, the trial court was given ample and complete warning of the plaintiff's failure to prove its complaint which was predicated on an alleged breach of an express warranty that was not proved, and the trial court was given a last chance to correct "his own errors without the delay, expense or other hardships of an appeal."

3.

The form and substance of the Respondents' motion for a new trial was substantially the same as a motion for judgment notwithstanding the verdict.

Had the respondents made a motion for judgment notwithstanding the verdict in the trial court under Rule 50(b), it would have to follow under the *Cone* decision that the Circuit Court of Appeals would have ample power to make a final disposition of the case.

The respondents' motion for a new trial first asked that the trial court should *set aside* the verdict and judgment (Rec. 204). The motion for new trial was then followed by a specification of errors by the trial court, which repeated the refusal of the trial court to consider the repeated defense that the respondents refused to warrant the goods.

If, in drafting this motion, the respondents, instead of using the words "a new trial" had used the words "demand judgment," the motion would have constituted a proper and sufficient motion for judgment notwithstanding the verdict. Rule 50(b) does not require that a motion for judgment notwithstanding the verdict itself shall specify any grounds, but that the motion for judgment notwithstanding the verdict shall be "in accordance with his motion for a directed verdict."

It has been held that a party's motion for a directed verdict not only includes the written grounds specified in the motion, but also the previous arguments of the respondents in support of their previous motions throughout the case. (*Dawson* v. *McWilliams*, 146 F. (2d) 38; *Pickering* v. *Corson*, 108 F. (2d) 546.)

Throughout the trial, as we have previously specified, the respondents kept bringing to the trial court's attention their defense that they refused to warrant the goods. This was ignored by the trial court and by the petitioner.

Assuming, without conceding, that Rule 50(b) applied to the case at bar relative to a post-verdict motion, it was fully complied with by the respondents' motion for a new trial, so that either the trial court or the Circuit Court of Appeals had the power to enter final judgment for the respondents.

Rule 50(b) is not mandatory that *both* motions, that is to say, a motion for a new trial and a motion for judg-

ment must be made within ten days after the reception of a verdict in order for the trial court to grant the *previous reserved* motion of a party for a directed verdict. The rule reads that:

> "Within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside, and to have judgment entered in accordance with this motion for a directed verdict; * * *."

(The respondents in their motion for a new trial asked that the verdict and judgment of the trial court should be *set aside*.) The rule then provides that a motion for a new trial *may* be joined with a motion for judgment or a new trial may be prayed for *in the alternative*. Assuming, without conceding, that Rule 50 (b) applied to the case at bar, the respondents simply chose one of the alternatives in its post-verdict motion, namely, a motion for a new trial.

Again, if it is assumed, without conceding, that Rule 50(b) applied to the instant suit, the matters set forth in the respondents' motion for a new trial, coupled with the respondents' previous motion for a directed verdict at the conclusion of all the evidence in the case and their previous arguments throughout the trial, were a sufficient basis for the trial court and the Circuit Court of Appeals to enter judgment for the respondents, in accordance with their *previous reserved* motion for a directed verdict.

The following language in Rule 50(b) is pertinent to this precise point and this language is:

> "Whenever a motion for directed verdict, made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to a jury, subject to a *later*

determination of the legal questions raised by the motion." (Italics ours.)

Since the respondents' motion for a directed verdict, coupled with the previous arguments of the respondents, were specific and sufficient for the entry of judgment for the respondents, the "*later determination* of the legal questions raised by the motion for a directed verdict" must be construed to mean that this *later determination* could be had by either a motion for a new trial or a motion for judgment notwithstanding the verdict. The detailed and comprehensive motion of the respondents for a new trial was sufficient under Rule 50(b), if it applied to the instant suit, for a post-verdict *later determination* of the previous reserved motion of the respondents for a directed verdict, so that the Circuit Court of Appeals had the power to direct the entry of judgment for the respondents.

4.

No part of Todes' deposition was admitted in evidence. The record is clear that the entire Todes deposition was excluded by the trial court.

The Circuit Court of Appeals in its opinion on the petition for rehearing, held correctly that no part of Todes' deposition was ever admitted in evidence (Rec. 258). The respondents filed in the Circuit Court of Appeals certain suggestions wherein they erroneously stated that some fragments of the Todes deposition were admitted in evidence. As we will see in a moment when the exact record is described to this Court, the respondents were in error when they filed these suggestions.

In the respondents' original brief in opposition to the petition for certiorari, in order to crystalize the propositions of law involved in the instant case, respondents conceded that certain portions of the Todes deposition

might be considered as having been introduced in evidence. We now find, after a careful rechecking of the record, that we were in error in making this concession. A careful examination of the record of the trial court shows clearly and conclusively that the Circuit Court of Appeals was entirely correct that no part of the Todes deposition was admitted in evidence.

Here is what the record actually shows: Until the trial court granted the petitioner's motion for a directed verdict, the trial was a trial by jury. The petitioner did not request a trial by jury, but only the respondents requested a jury trial.

At the conclusion of the petitioner's case, the respondents made an oral motion for a directed verdict. The jury retired from the courtroom and oral arguments on the motion were commenced (Rec. 116). The trial court denied this motion of the respondents for a directed verdict (Rec. 120). *While the jury were still excluded from the courtroom, the petitioner presented an oral motion for a ruling in advance as to the anticipated evidence of the respondents, which the petitioner contended should be excluded because of the parol evidence rule.* Practically all of this anticipated evidence was contained in the Todes deposition which was then on file in the case. There was a long argument on this motion, and the trial court announced that he would rule against the respondents on this point involving the parol evidence rule (Rec. 143).

The jury then were brought back into the courtroom (Rec. 143) and the Todes deposition was then opened and was about to be read when the trial judge again had the jury excluded from the courtroom (Rec. 144).

During the entire time that the jury was again excluded from the courtroom, there was a long colloquy

between counsel and the trial court concerning the Todes deposition. The first portion of the deposition that was read or considered by the judge was that part which commenced with the first objection of counsel for the petitioner to the deposition, and it appears at typewritten page 6 of the deposition (Rec. 144).

Regardless of the petitioner's emphatic statements that the previous pages of the Todes deposition were considered by the trial court, the record shows that they were not, and these previous pages relate to the alleged evidence that the respondents dealt in quantities of tequila through Todes. (We will comment on this portion of the deposition later.)

The trial court ruled that practically every portion of the Todes deposition would be excluded, except a fragment or two that the judge said "might stand."

After the colloquy between counsel and the court concerning the Todes deposition was completed, the jury then took their places in the jury box (Rec. 161). It is important to note, however, that during the entire time the trial judge was considering the deposition, *the jury were excluded from the courtroom.* The petitioner was then obviously satisfied with his success in having excluded practically the entire deposition of Todes, and the petitioner made no effort to read in open court, *in the presence of the jury, at any time* a single word of the Todes deposition.

After the trial court directed the jury to return a verdict for the plaintiff, and after a directed verdict was returned by the jury, then the court entered judgment on the verdict (Rec. 177). That was the end of the case so far as a trial by jury was concerned.

After the court entered judgment on the verdict, then respondents' counsel, with the approval of petitioner's

counsel, called the trial court's attention to the fact that the trial judge had ruled that a few fragments of the Todes deposition would be admitted in evidence (Rec. 177). However, this fragment or two were never read into the record *in the presence of the jury.*

Accordingly, after a careful rechecking of the record, the results of which we have just detailed to Your Honors, it appears clearly and conclusively that no part of the Todes deposition was ever properly introduced in evidence in the presence of the jury during the course of the trial.

In the respondents' brief in opposition to the petition for certiorari, we erroneously stated that an important fragment of the Todes deposition (Rec. 154) was left in the record and this involved the admission of Lazarus contained at page 23 of our brief in opposition to the petitioner for certiorari. At page 27 under footnote 19, of the petitioner's additional brief, the petitioner quoted a portion of the Todes deposition that it had been successful in having excluded by the trial court. (Later in this brief we will comment briefly as to this excluded evidence and the entire Todes deposition.)

In spite of the previous confusion of both counsel as to what actually happened in the trial court as to the Todes deposition, a careful re-examination of the record shows that it is clear beyond doubt that no part of that deposition was ever read in open court *in the presence of the jury* at any time.

Until the trial court directed a verdict for the petitioner, the hearing was a trial by jury, and those portions of the Todes deposition that the petitioner now fallaciously insists were introduced in evidence, should have been read to the jury before they could be con-

sidered as having been introduced in evidence. There is nothing novel about this proposition. It was asserted by this Court in the early case of *Hodges* v. *Easton*, 106 U. S. 408, which is cited frequently in petitioner's original and additional briefs. At page 10 of the petitioner's reply brief in support of its petition for certiorari, the petitioner under footnote 4 cites *Barney* v. *Schmeider*, 9. Wall. 246, and *Hodges* v. *Easton*, 106 U. S. 408. In commenting on these cases the petitioner erroneously states that they hold that even when a trial judge directs a verdict, the evidence must be "*submitted* to the jury," or that the "participation" of a jury is essential even in a directed verdict case. This is absurd as well as inaccurate. In using the words "submitting" the evidence to the jury, and that "participation" by a jury is essential, the petitioner was hinting at the preposterous idea that under federal court decisions, even when a trial court directs a verdict, the evidence must be "submitted" to the jury for their independent judgment or determination of the facts. This is ridiculous as well as inaccurate. The holdings in these cases of *Barney* v. *Schmeider* and *Hodges* v. *Easton* were that where the trial court directs a verdict, the evidence must be heard, read to, or presented *in the presence of the jury.* (*Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 382, 424, 425.) That is all the words "submitted" to the jury or "participation" by a jury mean in directed verdict cases. These words cannot be violently distorted to mean that when the trial court directs a verdict, the evidence must be "submitted" to the jury for their independent determination or judgment of the facts. In directed verdict cases all the "submitting" of evidence and all "participation" by the jury in these cases ceases in effect, as soon as the court directs the jury to return a verdict. In the instant suit, *all of the evidence admitted by the trial court in behalf of the petitioner was heard and given in the presence of the jury.*

Even after excluding from the consideration of this case the fragment of the Todes deposition contained in Lazarus' admission, detailed at page 23 of our original brief, it still must follow, as a matter of law, under the undisputed facts, that the Circuit Court of Appeals was entirely correct in holding that the plaintiff failed to prove any claim against the defendants. The petitioner's entire case was predicated on an alleged express warranty of quality, and the petitioner failed to prove a word or syllable in support of this alleged warranty. Until the petitioner would have proven the existence of an alleged express warranty, the respondents were under no duty to prove their defense that they refused to give any warranty as to the goods because of their agency status.

It is clear beyond any doubt that the Circuit Court of Appeals held correctly that no part of the Todes deposition was ever admitted in evidence.

5.

The history, purposes and wording of Rule 50(b) of the Federal Rules of Civil Procedure establish beyond all doubt that the Rule does not apply to a directed verdict where the court grants a motion for a directed verdict without submitting the case to the jury for its independent determination of the facts.

The petitioner's position in this court is inconsistent. In its petition for certiorari and in its reply to the respondents' brief in opposition to certiorari, the petitioner took the position that the Circuit Court of Appeals had no power to enter a final judgment in the instant suit because of the constitutional barrier of the Seventh Amendment, which prohibited that court from entering final judgment in a case tried before a jury in the trial

court. In taking this initial position, the petitioner displayed no embarrassment over its successful efforts in the trial court in avoiding the independent verdict of a jury in the lower court.

In its additional brief, the petitioner reverses the field, so to speak, and apparently has abandoned its jury trial constitutional point, and the petitioner now takes the position that since there was no conflicting evidence introduced in the trial court, questions of law only were presented, which authorized the trial judge to make a final disposition of the case pursuant to his entry of judgment on a directed verdict, and that the trial court's judgment should be affirmed.

It is obvious that Rule 50(b) was adopted to permit the trial court to reserve his ruling on a motion for a directed verdict so that re-trials upon reversals in courts of appeals could be kept down to a minimum. The rule automatically reserves for later determination the legal questions raised by a motion for a directed verdict.

If the trial court, after a verdict for one party is returned by the jury, enters judgment for the other party on his previous reserved motion for a directed verdict, upon appeal, if the judgment is reversed, the verdict of the jury is reinstated and a re-trial is prevented. This has happened repeatedly, and this result followed when this Court reversed final judgments of Circuit Courts of Appeals for defendants in jury cases and reinstated the original verdicts of the jury and judgment in behalf of the plaintiffs. Your Honors followed this procedure in *Halliday* v. *U. S.*, 315 U. S. 94, *Berry* v. *U. S.*, 312 U. S. 450, and *Conway* v. *O'Brien*, 312 U. S. 492, and reference to this procedure in these three cases was made by Your Honors at page 215 of the *Cone* decision.

As we argued in our original brief that, if in the *Cone* case, the defendant had made a motion for judgment notwithstanding the verdict, the Circuit Court of Appeals still would not have had the power to enter a final judgment for the defendant on appeal, as the general verdict of the jury in favor of the plaintiff in that case was based on erroneous evidence introduced in behalf of the plaintiff, and the case would have had to be remanded to the trial court for a new trial, as the case was still a potential jury case that required a trial by jury.

We believe it is plainly evident that the very wording, history and purposes of Rule 50(b) can only mean that it applies to cases that "go to the jury" for their "independent, voluntary consideration and verdict as to contested facts." This was the language used by the Circuit Court of Appeals in its opinion on the petition for rehearing (Rec. 260), and the idea expressed by these words obviously is not novel.

The existence of three elements are necessary to invoke the application of Rule 50(b). First, the ruling on the motion for a directed verdict must be reserved. Obviously if a motion for a directed verdict for one of the parties is immediately granted, as soon as it is made, nothing is reserved. Secondly, the case must be submitted to the jury, and third, there must be a *later determination* of the legal questions raised by the previous motion for a directed verdict.

Let us talk about the second element, "submitting the case to the jury subject to a later determination * * *". Can any reasonable person contend that this means anything else but that the jury must consider the case and exercise their own judgment and make their independent determination of conflicting evidence?

The hypertechnical distortions of the words "submitted to the jury" constantly urged by the petitioner in all of

its briefs must be brushed aside on the basis of their own authorities of *Hodges* v. *Easton*, 106 U. S. 408, and *Barney* v. *Schmeider*, 9 Wall. 248.

Now we come to the third element, "the later determination" of the legal questions raised by the motion. These important words in the rule cannot be disregarded and treated as surplusage. They mean exactly what they say, namely, that after the jury's verdict is returned, then, *and not until then*, does the trial court make a later determination of the previous reserved motion for a directed verdict. Because of this third element of "later determination" itself, it is obvious that the rule does not apply and cannot apply to a motion for a directed verdict that is immediately granted by the trial court. There never is any "later determination" of any legal questions when the court enters a directed verdict without submitting the case to the jury for their independent judgment on the facts.

The very title of the rule, "Reservation of Decision on Motion," establishes that Rule 50(b) only applies to cases that go to the jury for their independent voluntary consideration and the exercise of their own judgment on the evidence.

Rule 50(b) was held by this Court to apply in numerous cases, including the *Cone* case, *Halliday* v. *U. S.*, 315 U. S. 94, *Berry* v. *U. S.*, 312 U. S. 450, *Conway* v. *O'Brien*, 312 U. S. 492, because in each of these cases the trial court did not enter motions for directed verdict, but permitted the cases to go to the jury for the exercise of their independent voluntary consideration and their own judgment on the contested facts.

That is not the situation in the case at bar where the petitioner admits that there is no conflicting evidence. In support of its contentions, the petitioner has resurrected

the 35 year old case of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, and several older cases that are fully discussed in both the majority and minority opinions in the *Slocum* decision. There was nothing revolutionary decided in the *Slocum* case and the substance of the principles of law in that case is the law today. Professor Schofield in 8 Illinois Law Review 287, cited by the petitioner in all its briefs, wrote a very comprehensive article on the *Slocum* decision and new trials and the Seventh Amendment. On the very first page of this article (p. 287) Professor Schofield made a penetrating and decisive analysis of the *Slocum* case by pointing out that all it held was that the Seventh Amendment "compels the Circuit Court of Appeals to order a new trial when, for want of evidence enough for a jury to act on by finding a verdict for the plaintiff, it reverses a judgment for the plaintiff entered on a general verdict for the plaintiff, arrived at by the jury *by the exercise of their own judgment on the evidence*, finding a material fact; and forbids the Circuit Court of Appeals to direct judgment for the defendant on the evidence in disregard of the general verdict for the plaintiff. The reason is, that the rules of the common law referred to in the Seventh Amendment forbid any federal tribunal but another jury on a new trial *to find a material fact different from* the finding of a jury; * * *" (Italics ours.)

At page 36 of its additional brief, the petitioner unwittingly quotes portions of the *Slocum* case which emphasize that in a jury trial it is the exclusive function of the jury to "pass on *issues* of fact."

In the *Slocum* case the court denied the motion of the defendant for a directed verdict. The defendant in that case did not ask the trial court to reserve its ruling on the questions of law presented by its motion for a directed verdict, so that the case could go to the jury for

its verdict, subject to a later determination of the legal questions that could have been reserved by the motion for a directed verdict. This procedure had been followed for many years in the past and was in use even at the time of the adoption of the Seventh Amendment. That was pointed out by this Court in its later decision in *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 659, 660.

Since in the *Slocum* case the defendant did not ask the trial court to reserve its ruling on the defendant's motion for a directed verdict for a later determination after the jury's verdict, this Court held that the constitutional barrier of the Seventh Amendment prohibited the Circuit Court of Appeals from making a final disposition of the case. Later, when the *Redman* case reached this Court, Your Honors pointed out in that decision that the defendant in that case expressly requested the trial court to reserve its ruling on its motion for a directed verdict so that the Circuit Court of Appeals had the power, upon reversing judgment for the plaintiff, to enter final judgment for the defendant. In that case there was a general verdict rendered by the jury for the plaintiff.

Rule 50(b) was adopted in contemplation of both the *Slocum* and *Redman* cases, and the rule automatically reserves for later determination the legal questions raised by a previous motion for a directed verdict.

In its various briefs filed in this Court, the petitioner contends that Professor Schofield's treatise states that the *Slocum* case is authority for the proposition that even in directed verdict cases the Circuit Court of Appeals cannot reverse a lower court judgment and enter a final judgment for the other party. Professor Schofield in his Law Review article wrote nothing of the kind. On the contrary, he reached the opposite conclusion. Here are

the pertinent quotations from Professor Schofield's article in his comment on the *Slocum* case:

> "*The directed verdict on a material issue of fact and the Seventh Amendment.*—The way the opinion of Van Devanter, J., employs *Baylis* v. *Travellers' Insurance Co.* along with *Barney* v. *Schmeider*, 9 Wall. 248, and *Hodges* v. *Easton*, 106 U. S. 408, to support the majority's result, caused the minority to think the majority intended to say, and do say, the verdict of a jury returned in passive obedience to a peremptory instruction of a trial judge is an indispensable thing of substance under the Seventh Amendment and not a dispensable thing of form. *No such point was before the court, as there was no directed verdict in the case.*" (p. 297, Footnote 14.)
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> "A fact tried, *i. e.*, found by a *peremptorily directed verdict* cannot be a 'fact tried by a jury,' within the meaning of the Seventh Amendment, whether the case turns on a question of fact, or on a question of law. A motion for a directed verdict is a proceeding whereon the trial judge determines from the evidence whether there is a material issue of fact for trial by a jury, not unlike the proceeding *in jure* in Roman civil procedure before the praetor resulting in the *litis contestatio*, or formulation and knitting of the issue, before the case passed *in judicio* before the *judex* for a trial of the issue and rendition of the *sententia* or judgment (Sohm, Institutes of Roman Law, Ledlie Tr., 2nd ed., 237-241); and not unlike our proceeding before the equity judge when he formulates an issue of fact for trial by a jury in a common-law court. *When the trial judge peremptorily directs a verdict, he thereby decides there is no material issue of fact arising on the evidence for trial by a jury.* When the trial judge is reversed by a court of error or appeal for peremptorily directing a verdict on the evidence in a case that turns on a question of fact, not of law, the con-

sequence is that he denied the right of trial by jury secured by the first clause of the Seventh Amendment and the reversing judgment must order a trial by jury, for there never was any trial by jury. *The second clause of the Seventh Amendment has no application to a case where the trial judge directs a verdict; it comes into play only after a verdict found by a jury on a material issue of fact;* it regulates and controls the proceedings after the verdict of a jury, not before; the proceedings before the verdict of a jury are regulated and controlled by the first clause exclusively." (pp. 297 & 298, Excerpts from Footnote 14.) (Italics ours.)

Professor Schofield also pointed out that the *Slocum* case, which "went to the jury" in the trial court, involved a material *issue of fact* found by a jury. The following quotations from his article demonstrate this:

"It is plain, as it seems to me, the majority in the *Slocum* v. *New York Life Insurance Co.* reached the only allowable result in the case before the court on the constitutional jury-trial point they decided; and the judgment of the court on that point ought to have been unanimous, but with a less comprehensive opinion. The trouble in the court arose out of the neglect of the justices to allow themselves to be restrained by the fact the *case before them turned on a material issue of fact found by a jury.*" (p. 290)

* * *

"The case was not one turned on a pure question of law that ruled the case; there was no doubtful point of law in the case at all * * *. *The case turned on a pure question of fact, i. e.,* waiver *vel non.* The trial judge refused to direct a verdict for the defendant on the fact of waiver; and the jury found a general verdict for the plaintiff *by the exercise of their own judgment on the evidence,* thus finding the fact of waiver in favor of the plaintiff." (p. 294.) (Italics ours.)

The *coup de grace* as to the petitioner's misconception of Professor Schofield's article is furnished by its last sentence in discussing the *Slocum* case, that "there was no case before the court turning on a pure question of law such as to rule the case; the case before the court turned on a pure question of fact found by a jury in favor of the plaintiff." (p. 487)

A comparison of the *Slocum* and *Redman* cases shows that there is no real conflict between the two cases. Professor Schofield pointed out that the *Slocum* case essentially involved a question of fact to be determined by a jury. The *Redman* case did not involve any question of fact, as the facts were undisputed, and only a question of law was involved so that the Circuit Court of Appeals had the power to enter a final judgment for the defendant in that case on its motion for a directed verdict made in the trial court.

Since the petitioner concedes that there was no conflicting evidence in the case, questions of law only were presented for decision at the conclusion of all the proof by both parties in the case. Both parties thereupon made respective motions for directed verdicts. Respondents' motion was promptly denied, and petitioner's motion for a directed verdict was immediately granted.

Although under Rule 50(a) of the Federal Rules of Civil Procedure, when both parties made motions for directed verdicts, this did not constitute a waiver of a trial by jury, it must follow that insofar as the petitioner was concerned, when its motion for a directed verdict was granted without having the jury pass on the case, this effected a waiver of a trial by jury by the petitioner. When the trial judge immediately granted the petitioner's motion for a directed verdict without having the case passed on by a jury for their inde-

pendent judgment, this action of the trial judge at that point treated the case as a trial by the court without a jury.

Immediately after the directed verdict was entered, the trial judge entered judgment for the petitioner against the respondents. (Rec. 177)

It is incongruous from this state of this record for the petitioner to urge that it then become necessary for the respondents to file a motion for judgment notwithstanding the verdict, to enable the Circuit Court of Appeals to make a final disposition of the case. Under those circumstances, any motion of this nature by the respondents could only be a motion for judgment "notwithstanding the judgment" and that would have been senseless as well as an empty, meaningless ritual.

Since the petitioner admits that there is no conflicting evidence, the procedure of the trial judge meant that he had exercised his judgment on a matter of law without the intervention of any determination of the facts by a jury. There was no true jury verdict in this case, so that it was unnecessary for the respondents to file a motion for judgment notwithstanding the verdict to enable the Circuit Court of Appeals to make a final disposition of the case.

Where, as in the case at bar, the trial court peremptorily directs a verdict without permitting the jury to exercise their own independent voluntary judgment on the facts, the court has immediately acted on a question of law and, for all practical purposes, has ended the trial of the law suit and has decided the issues involved.

Along these lines, the Supreme Court of Illinois recently, on November 17, 1947, handed down an opinion in

Jackman v. *North*, 398 Ill. 90, 103, 104. In that case the trial court directed the jury to return a verdict for the defendants, and the court thereupon gave the following instruction:

> "We the jury find the will in question is the last will and testament of Louise B. Paulson, deceased, and on order of court verdict is by the jury returned accordingly and the clerk will so enter it. The jury is discharged."
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> * * *

This opinion then states:

> " 'The peremptory instruction to find for the plaintiff was, in effect, taking the case from the jury. When the court directs a verdict an issue of law is raised upon the whole case, and there is no fact for the jury to find. * * *' The principle announced in that case is controlling here. The giving of the peremptory instruction took the case from the jury and the record before us is sufficient to show that fact. *The formal return of a verdict by the jury would not add anything to the record already made.*" (Italics ours)

These principles are not in conflict with the petitioner's cases of *Hodges* v. *Easton*, 106 U. S. 408, and *Barney* v. *Schmeider*, 9 Wall. 248, as in these cases the rule is laid down that when the court instructs the jury to return a directed verdict, *before* the verdict is directed the jury must hear all of the evidence in the case that is admitted by the court. This requirement was met in the case at bar, and was also met in this last cited case of *Jackman* v. *North*.

We pointed out in our original brief in opposition to the petition for certiorari, at pages 17-19, that where the trial court directs a verdict without submitting the case to the jury for the exercise of their own judgment on the evidence, the trial court has exercised its judgment on a matter of law, and that the rendition of a verdict by the jury is a mere formality. We cited cases that the

jury could not disobey the trial court, who could compel obedience to his order for a directed verdict.

At page 11, under footnote 5 of its original petition for certiorari, at page 10 under footnote 4 of the petitioner's reply brief in support of its petition for certiorari, and at page 31 under footnote 21, the petitioner poses a supposed "paradox". This so-called paradox is, that it is not clear to the petitioner how the Circuit Court of Appeals can instruct a District Court to direct a verdict where the jury has already been discharged. A simple test proves the unsoundness of this so-called paradox.

The Cone decision holds that when the facts are undisputed and questions of law only are involved, the Circuit Court of Appeals can enter a final judgment after reversal. It is clear from the *Cone* decision that when a trial court improperly denies a defendant's motion for judgment notwithstanding the verdict, the Circuit Court of Appeals can enter judgment for a defendant and the previous discharge of the jury by the trial court is not a bar to this final disposition by the Circuit Court of Appeals.

This so-called paradox was no problem to this court when it ordered a final disposition in favor of the defendant in the *Redman* case. Thus, it is seen from these simple tests that this paradox becomes a paradox lost.

At this point we would like to summarize our comment concerning four old cases that are cited repeatedly in all of the petitioner's briefs. The character of most of these cases are aptly described in the dissenting opinion of Justice Hughes in the *Slocum* case. *Hodges* v. *Easton*, 106 U. S. 408, involved a jury trial and certain alleged undisputed facts were never heard by or submitted to the jury, and this Court held on appeal that the insuffi-

cient record afforded no basis for the lower court's judgment and that on appeal this court could not ascertain whether these facts were undisputed, and that there was no alternative but to direct that a trial be had "upon all the material issues of fact" (p. 425, *Slocum* decision).

In *Barney* v. *Schmeider*, 9 Wall. 248, in a jury trial, the testimony taken at a former trial was not read to the jury. At page 424 of the *Slocum* dissenting opinion Justice Hughes, in describing this case, said:

> "The court overruled the contention that there was not a disputed question of fact, saying, after reviewing the case, 'Where there is any discrepancy, however slight, the court must submit the matter to which it relates to the jury, because it is their province to weigh and balance the testimony and not the court's. The proposition is not, therefore, sustained, that nothing but a question of law was to be decided.'"

In *Baylis* v. *Travellers' Insurance Co.*, 113 U. S. 316, at page 426 of the dissenting opinion in the *Slocum* case, Justice Hughes said:

> "The pith of the decision is that, despite what the trial judge said regarding the matter, there were really questions of fact for the jury, and that the trial judge could not take the place of the jury in deciding them."

Suydam v. *Williamson*, 20 How. 42, is cited under footnote 23 at page 37 of the petitioner's additional brief. It is a mystery to us why the petitioner cited this case, and also the sentence at page 37 of the additional brief which ends with a reference to footnote 23. This very sentence itself is decisive of the procedural question in this case, namely, that both the trial court and the Circuit Court of Appeals, on review, can make a final disposition of the case, where only legal questions are involved and a directed verdict has been entered by the trial court. This damaging sentence reads:

> "The practice of reserving the legal questions in order to permit the *final disposition* of the proceedings without a new trial was followed not only in independent verdict cases, but also in directed verdict cases." (Italics ours).

In summarizing this discussion relative to Rule 50(b), we believe that the crucial words "later determination" by themselves indicate that the rule has no application where a directed verdict is entered without submitting the case to the jury for its independent voluntary consideration and verdict. The very act of the trial judge in granting a motion for a directed verdict without submitting the case to the jury is tantamount to an *immediate determination* of the legal questions raised by the motion for a directed verdict. The conclusion is therefore inescapable, that this pointed language in Rule 50 (b) establishes that the rule can only apply to cases where the trial court reserves its ruling on the legal questions involved in motions for a directed verdict, and submits the case to the jury for its independent voluntary determination of the facts.

We believe we have demonstrated beyond doubt that Rule 50(b) does not apply where the trial court takes the case from the jury and grants a motion for a directed verdict without submitting the case to the jury.

6.

The final order entered by the Circuit Court of Appeals in the instant suit for judgment in behalf of the Respondents is not in conflict with the decision of this court in the case of Cone v. West Virginia Pulp & Paper Co.

In the *Cone* case the trial court submitted the entire case to the jury for its independent voluntary consideration and verdict, and the jury returned a verdict for

the plaintiff. In that case the facts were controverted. The plaintiff's proof in that case as to possession was held to be insufficient by the Circuit Court of Appeals, so that the inference follows that the plaintiff might introduce sufficient proof of possession at a new trial. Moreover, in that case evidence was improperly admitted in the trial court in behalf of the plaintiff.

In the *Cone* case and in the *Halliday, Berry* and *Conway* cases (mentioned in the *Cone* decision), even if the losing parties had filed in the trial court motions for judgment notwithstanding the verdict of the jury, nevertheless the Circuit Court of Appeals would still have been without power to reverse the judgments of the trial court and to enter judgment for the losing party in the trial court, because in each of these cases there were controverted questions of fact involved that had been or would have to be passed on by a jury because of the constitutional right to a trial by jury by the winning party in the trial court.

It is important to note the portion of the opinion of this Court in the *Cone* case that evidence was improperly admitted in behalf of the petitioner by the trial court. No such situation exists in the case at bar. No point was made in the instant suit that the trial court imporperly admitted any evidence in behalf of the petitioner. Accordingly, in the *Cone* v. *West Virginia Pulp & Paper Co.* case, in order to relitigate the entire case and permit the petitioner one more chance to introduce, if it could, proper and sufficient evidence to supplant the petitioner's evidence that originally was *improperly* admitted, this Court remanded the case to the trial court for a new trial.

That is not the situation in the case at bar. The petitioner admits that there is no conflicting evidence in the record. Therefore, only a question of law is involved

as to the correctness of the final decision of the Circuit Court of Appeals.

The petitioner had full opportunity in the trial court to offer all the competent evidence that it had available. Petitioner's counsel was present when the deposition of Todes was taken and cross-examined him at length. Todes' deposition was taken December 24, 1945. Counsel for the petitioner had an opportunity of at least two and one-half months to study the deposition of Mr. Todes before the trial of the case was commenced. The petitioner could have introduced on its own motion any part of the deposition of Todes as part of its proof. Instead of doing this, the petitioner saw fit to exclude the entire deposition as evidence in the case. It therefore comes with poor grace for the petitioner at this time, on appeal, to seek to use any part of the Todes deposition that it successfully excluded in the trial court.

The petitioner relied solely on an express warranty. In the trial court it was warned on at least five occasions of the respondents' chief defense that they refused to give any warranty as to the goods. This defense covered not only an alleged express warranty, but also an alleged implied warranty. Because of the sole reliance in petitioner's complaint of an express warranty, it was incumbent on the petitioner to prove the case upon which it relied, and it failed wholly to do so.

After the trial court peremptorily directed a verdict against the respondents, their motion for a new trial again called to the trial court's attention, as well as the attention of the petitioner, that they were deprived of establishing their defense that they refused to give any warranty. Here again the petitioner was amply warned of its failure to prove the basis of its case, namely, the alleged express warranty.

Inasmuch as the petitioner's proof was fully developed in the trial court, and none of its evidence was improper or erroneous, the final disposition of the case by the Circuit Court of Appeals on the undisputed evidence should be upheld by this Court.

The *Cone* case and the other cases mentioned in that decision all involved controverted questions of fact requiring a trial by jury, so that Rule 50(b) was applicable to those cases. The case at bar involved undisputed facts where only questions of law were presented for determination. In our opinion the following portions of the decision in the instant case by the Circuit Court of Appeals on rehearing are pertinent as to our contention that the *Cone* decision is not in conflict with the final disposition of the instant case by the Circuit Court of Appeals. That court held in commenting on the *Cone* decision that:

> "The Supreme Court did not hold that if such a motion had been made and overruled, the Circuit Court of Appeals could not have directed, if warranted in law, the District Court to sustain the motion of the defendant for a directed verdict. Nor did the Supreme Court hold that a Circuit Court of Appeals may never dispose of a case where only errors of law are involved.
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> Rule 50 (b), in our opinion, applies only to cases where the matter is submitted to a jury for its independent voluntary consideration and verdict. Where the court directs a verdict for the plaintiff, as in the instant case, the matter is not submitted to the jury for it to exercise its independent judgment on the facts. The court has exercised its judgment on a matter of law. Where the court, as in the instant case, has sustained the motion of the plaintiff for a directed verdict, the legal consequence is the same as if the District Court had submitted the case

to the jury, the jury had returned a verdict for the plaintiff, and the District Court had overruled the motion of the defendants for judgment notwithstanding the verdict" (Rec. 259, 260).

In the instant suit, since the petitioner was told that the respondents did not handle or have possession of the goods, and the petitioner did not rely on the skill, choice or selection of the goods by the respondents, under the uniform and settled authorities on this point discussed in our brief in opposition to *certiorari* at pages 33-34, there can be no implied warranty of any kind in the transaction in the suit at bar.

7.

The motions of the Respondents for a directed verdict were sufficient and adequate. These motions included the previous arguments of the Respondents throughout the case and both the motions and the previous arguments included the basis of the reversal and the directions of the entry of judgment for the Respondents by the Circuit Court of Appeals.

The cases are clear that the respondents' written motion for an instructed verdict at the conclusion of all the evidence should be construed with the previous oral argument of the respondents in support of their oral motion for an instructed verdict at the conclusion of the petitioner's case, and both the motion and the arguments and reasons in support thereof should be construed together (*Dawson* v. *McWilliams*, 146 F. (2d) 38; *Pickering* v. *Corson*, 108 F. (2d) 546).

Although the agency phase of the case may have been stressed in paragraphs numbered 1 and 2 in respondents' written motion for an instructed verdict (Tr. 202), these specific grounds should be construed with the previous defense of the respondents set forth in their amended

answer and mentioned throughout the trial of the case, that they were not liable to the petitioner in the transaction because the respondents refused to warrant the quality of the goods in view of their agency status in the transaction. We argued this point at pages 26 to 29 of our original brief in opposition to certiorari.

As we stated heretofore, the petitioner was amply warned of the respondents' defense that they refused to warrant the goods. This was contained in the respondents' opening statement, in their amended answer, in their argument in support of their oral motion for a directed verdict at the conclusion of the petitioner's proof, in their argument on the petitioner's successful motion to exclude the Todes deposition, and in their argument at the conclusion of all the evidence when each of the parties made a motion for a directed verdict. This was supplemented by the defendants' motion for a new trial.

The petitioner was repeatedly told during the trial of the case that the respondents refused to give any warranty as to the goods.

Even though Rule 50 (a) of the Rules of Civil Procedure provides that a motion for directed verdict shall state the specific grounds therefor, technical precision need not be observed in stating the grounds for such motion. It is sufficient if the grounds are sufficiently stated to apprise the trial court clearly as to movant's position with respect to the motion (18 Hughes Federal Practice (1940), Sec. 24403). The petition, at page 40 of its additional brief, cited three cases on this point relating to the requirement of specific grounds in the motion for a directed verdict. We will now briefly discuss these cases.

In *Virginia-Carolina Tie & Wood Co.* v. *Dunbar*, 106 F. (2d) 383, the trial court denied a motion for a directed verdict. In this decision it was pointed out that if the grounds for a motion for a directed verdict are sufficiently stated to apprise the other party fairly as to movant's position with respect to the motion, the motion is sufficient, and it was also pointed out in that case that technical precision need not be observed for stating the grounds for such a motion.

In *Atlanta Greyhound Corporation* v. *McDonald*, 125 F. (2d) 849, it appears that a trial court properly denied the motion for a directed verdict even though the grounds for the motion were specifically stated.

In *Ryan Distributing Corporation* v. *Caley*, 147 F. (2d) 138, the trial court entered a judgment on a directed verdict for the plaintiff and the grounds for the motion were properly stated in the trial court.

We fail to see how any of these cases are in point here.

The respondents' written motion for an instructed verdict, filed at the conclusion of all the evidence in the case, should be interpreted in the light of the various points and authorities that have been repeatedly argued by the respondents during the course of the trial, in accordance with *Dawson* v. *McWilliams*, 146 F. (2d) 38, and *Pickering* v. *Corson*, 108 F. (2d) 546.

The third point in the defendants' motion for an instructed verdict must be construed in connection with their five separate and previous positions in the trial court, where they repeatedly informed the petitioner that one of the chief defenses of the respondents was that they refused to warrant the goods because of their agency status.

Throughout the trial and during the oral argument at the conclusion of all the evidence, when the motions of both parties for a directed verdict were argued, petitioner was informed of the respondents' defense that they refused to warrant the goods. Accordingly, the record is overwhelming that the grounds of the respondents' motion for a directed verdict were fully and adequately stated in accordance with Rule 50 (a) of the Federal Rules of Civil Practice.

8.

No Implied Warranty.

Even if petitioner's complaint had relied on an alleged implied warranty of quality, the petitioner failed to prove that the respondents were dealers of the goods, which is required under Section 15(2) of the Uniform Sales Act of Illinois.

Neither the petitioner nor the trial judge mentioned anything about an implied warranty during the trial of the case. If was not a factor in the case under the pleadings, the admitted evidence, the arguments and the various other events during the trial. Had the defendants made a motion for judgment in the trial court after the directed verdict was entered, the trial court would have promptly denied the motion, and the trial court would have made no comment or taken any action regarding any alleged implied warranty as this element was simply not considered throughout the trial. The petitioner first mentioned anything about an implied warranty in the Circuit Court of Appeals after arguments were had. Therefore, what justification can the petitioner have for arguing in this court that the petitioner was relying on an implied warranty in the trial court?

At pages 35-38 of our original brief in opposition to the petition for certiorari, we argued that the existence

of an alleged express warranty excluded an implied warranty as to the same subject matter. An express warranty follows because of the *refusal* of the buyer to buy, *unless* the seller makes an actual express warranty, that is to say, unless the seller makes written or oral representations as to quality, etc. On the other hand, a claim on an implied warranty is not predicated on any reliance by the buyer as actual representations which exist when an express warranty is made. Consequently, an express warranty is inconsistent with an implied warranty as to the same factors.

At pages 36 and 37 of respondents' original brief in opposition to the petition for certiorari, we cited a number of authorities where recovery was denied to buyers who pleaded the existence of an alleged express warranty but did not introduce evidence in support thereof, and sought to rely on the existence of an implied warranty as to the same subject matter.

The inconsistencies and contradictions between express and implied warranties as to the same subject matter has been firmly established and has not been changed by the Uniform Sales Act. Section 15(6) of the Sales Act (Ch. 121½, Ill. Rev. Stat. (1945) par. 15, p. 2953) provides: "An express warranty or condition does not negative a warranty or condition implied under this Act, unless inconsistent therewith." This particular provision does not make any reference to the same "subject matter." This section of the Uniform Sales Act means that an express warranty as to one particular factor or element does not negative an implied warranty as to a different element or factor. For instance, an express warranty as to color, quantity, dimensions or weight does not exclude an implied warranty if one exists, as to quality or fitness.

Where the buyer relies on an express warranty of quality or merchantability, he cannot recover on an implied warranty thereon. The alleged existence of an express warranty as to merchantability or quality in favor of the buyer is predicated on his lack of knowledge as to the goods and his conscious or deliberate *refusal* to buy the goods unless the seller expressly warrants their quality or merchantability, so that the buyer actually and intentionally buys the goods in reliance on the express warranty. An implied warranty as to quality or merchantability of goods is not based on any actual deliberate or intentional express statement as to the goods by the seller, so that there is no actual or deliberate reliance by the buyer on any statement by the seller. An express warranty as to merchantability or quality of goods is therefore inconsistent with an implied warranty as to merchantability or quality of the same goods.

In the instant suit, since the petitioner was told that the respondents did not handle or have the goods and the petitioner did not rely on the skill, choice or selection of the goods by the respondents, under the uniform and settled authorities on this point, there could not be any implied warranty of any kind in the transaction in the suit at bar, even if the petitioner had alleged the existence of an implied warrant in its complaint.

The sale for 750 cases of Tequila described as "Mariachi Gold". "Gold" referred to the yellow color of the beverage. Both parties tried the case in the trial court with the understanding that Illinois law would govern the transaction (Rec. 127, 128, 130, 132, 169, 171).

At pages 39-40 of respondents' original brief in opposition to petition for certiorari, we pointed out that the courts of review of Illinois have consistently followed

the rule that under Section 15(4) of the Illinois Uniform Sales Act, where a sale of goods is made under a particular trade name, there is an implied warranty to deliver the identical article sold, but there is no implied warranty of merchantability. It, therefore, appears that the petitioner could not recover in this case on either an express or implied warranty as to quality.

Under the uniform Illinois decisions, regardless of the decisions of other states, the petitioner could not recover against the respondents in this case on any implied warranty.

If we assume, without conceding, that the respondents were not agents, but the principals in the transaction, it was incumbent upon the petitioner to prove that the respondents were dealers in the goods before the petitioner could recover on any implied warranty under Section 15 (2) of the Uniform Sales Act of Illinois even if plaintiff's complaint had relied on an implied warranty.

The Circuit Court of Appeals properly pointed out that alleged proof of dealership in the Todes deposition was excluded from the record by the petitioner.

However, if we are still bound by our original concession in our brief in opposition to *certiorari*, that a portion of the Todes deposition might be considered as having been introduced in the record, we believe it is only fair to construe this portion with the entire deposition of Todes, so that this concession can be properly evaluated in the light of his complete deposition. Todes was a mere salesman for the respondents, whose authority was limited to soliciting orders for goods and sending the orders to the respondents, who in turn would send the orders to Mexico for confirmation and acceptance by the Mexican shipper (Rec. 22).

When Todes was employed as a salesman, he was told by the respondents that they were not in the liquor business nor did they see or handle the goods, and that all orders accepted by the Mexican shipper would be shipped directly to the buyer by the shipper in Mexico (Rec. 22). Todes in his deposition stated that when he obtained the initial order for the goods from Mr. Lazarus, Todes told Lazarus that they, the respondents, were not in the liquor business, knew nothing about the liquor business, and "they are not responsible for the shipments or the quality of the merchandise or anything about it" (Rec. 26). Thereupon, Lazarus ordered the goods.

Todes' deposition also states that he told Lazarus that the respondents "had nothing to do with the liquor business; they were not in the liquor business, and that they could not have an importer's license or any other kind of license as they were not in the liquor business, and that all orders Todes obtained, including the Globe order, were "subject to acceptance and confirmation by the shipper in Mexico" (Rec. 28).

After the shipment arrived in this country and was examined by the Food and Drug Agency, Todes' deposition states that Todes talked to Lazarus and Lazarus said "I agree that the shipper is responsible for it. • • • I am not saying that it is your fault, but it is the shipper's fault" (Rec. 32).

At page 27 of its additional brief, under footnote 19, the petitioner quotes a portion of the Todes deposition that was excluded as evidence in the absence of the jury (Rec. 160). This excluded portion quoted Todes as stating that after he told Mr. Lazarus that the respondents would not be responsible for the shipment of the merchandise or its quality, Lazarus had no comment. However, the order was given *after* Todes told Lazarus of the respondents' refusal to warrant the goods.

A disclaimer of warranty or refusal of warranty oftentimes is expressed on a label or other legend on the goods, and numerous cases have held that where buyers buy goods under these conditions the transaction is one where the seller has refused to warrant the quality of the goods. Lazarus admitted that he gave the initial order with the understanding that the respondents were not to be liable for the quality, because of his later admission to Todes "I agree that the shipper is responsible. * * * I am not saying that it is your fault, but it is the shipper's fault" (Rec. 32).

The respondents in the trial court made an offer of proof that their net commission in the transaction was $342.16 (Tr. 166). The trial court entered judgment against the respondents for $9,717.68.

Now, all of these portions of the Todes deposition that we have discussed under this section of our brief were without question excluded from the record during the trial of the case and we were compelled to discuss them because of the incorrect statements in the petitioner's briefs that certain portions of the Todes deposition were properly introduced in the record.

If the *entire* deposition of Todes had been properly introduced in evidence, the result in the instant suit would have to be the same that was reached by the Circuit Court of Appeals. The petitioner would still have relied on an express warranty without having proved it, and the uncontradicted Todes deposition would have proved that Lazarus gave Todes the initial order after Lazarus was clearly and definitely told by Todes that the respondents refused to warrant the quality of the goods or the shipments. The admission of Lazarus just quoted would have established that it was the petitioner's understanding that the respondents refused to

warrant the goods (Rec. 32). The Lazarus admission shows the construction the parties themselves placed upon their transaction. "No extrinsic aid can be more valuable," (*Slack* v. *Knox*, 213 Ill. 190, 194).

Even if it is assumed, without conceding, that there was properly introduced in the record only those portions of the Todes deposition upon which the petitioner relies in its briefs in this court, the petitioner still would have failed to prove an iota of proof in support of its allegation in its complaint as to the existence of an alleged express warranty. Consequently, the decision of the Circuit Court of Appeals in the case at bar would have been the same.

If it is assumed that the petitioner would have alleged in its complaint the existence of an alleged implied warranty of quality, then it would have been incumbent upon the petitioner to prove that the respondents were dealers, that is to say, principals who dealt in the goods. In that event, the uncontradicted entire Todes deposition would have proved that every order that Todes obtained was subject to confirmation by the shipper in Mexico, who made direct shipment from Mexico to the buyer in this country, and that the respondents acted as mere agents for the shipper in all these transactions.

The undisputed evidence properly admitted in the record in this case, and the undisputed evidence in the Todes deposition that was excluded by petitioner, establish conclusively that the respondents were only the agents of the shipper in Mexico, who could arbitrarily accept or reject any orders obtained by the respondents that were sent to him by his agents, the respondents.

A "dealer" has been construed to mean a shipper or a principal, and not an agent or a salesman. In *Cosner*

v. *Hancock*, 149 S. W. (2d) 239, it was held that a salesman was not considered as a "dealer".

In *Lovering* v. *Duplex Power Car Company*, 204 Mich. 658, 171 N. W. 374, the Michigan Supreme Court held that the provisions of the Michigan Securities Act applicable to a "dealer" did not apply to an agent.

Even if the plaintiff's complaint referred to an implied warranty and if it would be assumed, without conceding, that in the case at bar, the sale was made without being subject to acceptance and confirmation by the shipper, this would have constituted an isolated case as the record is barren of any other sales by the respondents. Moreover, if the other sales described by Todes in his extended deposition could be considered, all these sales were made by the respondents as agents as all these sales were subject to confirmation and acceptance by the shipper. It has been held that when a person makes an isolated sale, that sale does not constitute the dealer as the seller of the goods (*Overall* v. *Bezeau*, 37 Mich. 506, 507).

Inasmuch as the petitioner's point of an alleged implied warranty was not made in the trial court, and was not raised until the case was argued on appeal, and since the petitioner itself saw fit to exclude the entire deposition of Todes from the record in the case, there was no proof in the record that the respondents were dealers in the goods, which is a prerequisite to any recovery on an implied warranty under Section 15 (2) of the Uniform Sales Act of Illinois, assuming that petitioner's complaint would have alleged the existence of an implied warranty.

We would like at this point to call the Court's attention to certain facts in the transaction that were properly introduced in evidence. When the petitioner dealt with Todes, the salesman for the respondents, it considered

them as agents or brokers. This was admitted in open court by Morton L. Lazarus, Vice President of the petitioner, when he testified in the case (Rec. 96, 106).

Mr. Lazarus admitted that he was told that the respondents did not have possession of the goods and that it would be shipped directly from Mexico to the petitioner (Rec. 97).

Obviously there was such a great demand for alcoholic beverages at the time Lazarus gave his initial order that he promised Todes a finder's commission of $1.00 a case or $750.00 if the goods could be procured, and this commission was paid by the petitioner to Todes (Rec. 96).

Lazarus also admitted in open court that the petitioner received a telegram from the Mexican shipper offering to filter and recondition the merchandise (Rec. 104).

The trial court excluded evidence in the Todes deposition that about the time the goods arrived in this country, the bottom dropped out of the liquor market and the demand for the goods disappeared. The trial court also excluded the written admission of the petitioner that they refused the offer of the shipper to recondition the goods at his own expense "in view of the present liquor market conditions." (Def. Ex. 14 for identification; Rec. 201.)

The petitioner did not introduce any evidence that the respondents handled any of the money in the transaction, even though the letter of credit was made payable to them or to their assigns. The trial court excluded the respondents' offer of proof that the entire purchase price for the goods, in accordance with the Mexican shipper's invoice, was paid under the letter of credit, and that these monies were transmitted in their entirety to the shipper

in Mexico, who then paid to the respondents their gross commission on the sale (Rec. 165-166).

Even if all of the evidence we have discussed in this section, which was excluded successfully by the petitioner in the trial court, had been properly introduced in evidence, the record would then have still presented undisputed questions of fact, and would have presented the same ultimate questions of law which were the basis of the decision of the Circuit Court of Appeals, namely, the petitioner relied solely on an alleged express warranty of quality and failed to introduce a single syllable of proof in support thereof.

At pages 32 and 33 of our original brief in opposition to the petition for certiorari, we argued the point that in sales of food or beverages from one dealer to another dealer, there is no implied warranty by the seller as to the merchantability or quality of the goods. This is not to be improperly construed by the petitioner as an admission that the respondents were dealers. The proper meaning to be given to this argument is that even if the respondents would have been dealers, there could not have been any implied warranty in a sale from one dealer to another.

The undisputed facts in this case establish beyond all doubt that the respondents were not dealers or sellers or principals, but mere agents in the transaction. The petitioner recognized this agency status of the respondents and dealt with them in that capacity.

We regret that we were compelled to go into a lengthy explanation as to the excluded evidence in the case, but we deemed it necessary to do so in order to correct any possible misconceptions that may have arisen from the references and arguments in the petitioner's briefs as to proof that was excluded by the trial judge on petitioner's own motion.

9.

Petitioner's Duty to Minimize Damages.

Even if it is assumed, without conceding, that the respondents were the principals, the sellers in the transaction and not the agents, and that they sold the goods under an express warranty as to quality, it still would have been the duty of the petitioner to accept the offer of the Mexican shipper to recondition the merchandise (Rec. 104).

There was no time limit specified in the transaction for delivery of the goods, and therefore delivery could have been made within a reasonable time. Had the petitioner accepted the Mexican shipper's offer to recondition the goods, delivery of the goods in good condition could have been made within a reasonable time after the order was accepted by the Mexican shipper.

It is a fundamental rule of law that notwithstanding this supposed breach of contract by the seller, the buyer is under a duty to minimize the seller's damages. (15 Am. Jur., Sections 27, 28 and 30, pages 420-426; 25 C. J. S., Section 33, page 499, Note 51; *Cedar Rapids and Iowa City Railway & Light Co.* v. *Sprague Electric Co.*, 280 Ill. 386.) Petitioner, therefore, was under a duty to accept the Mexican shipper's offer to recondition the goods.

At pages 21 and 22 of our original brief in opposition to the petition for certiorari we quoted a portion of the 1944 Annual Report of the Food and Drug Administration, explaining the prevalence of spoilage in shipments of imported liquor and the common practice of reconditioning the goods under government supervision. Had the petitioner accepted the offer of the Mexican shipper to recondition the goods at his expense, the original trans-

action of sale would have been fully performed and no one would have been damaged.

10.

Parol Evidence Rule Moot in the Instant Suit.

The petitioner was successful in the trial in invoking the Parol Evidence Rule and thereby excluded the entire deposition of Todes which included his direct testimony of the refusal of the respondents to warrant the quality of the goods. Since this evidence was excluded and was not considered by the Circuit Court of Appeals, there is no particular point in arguing the applicability of the Parol Evidence Rule in the suit. This question has became moot. Some points on this topic raised in the petitioner's additional brief call for our brief comment. *Zell* v. *Amerilan Seating Co.*, 138 F. (2d) 641, cited at page 22 of the petitioner's additional brief contains a serious criticism of the parol evidence rule. At page 644 of that decision, the court said:

> "We thus construe the record because we do not share defendant's belief that the rule is so beneficent, so promotive of the administration of justice, and so necessary to business stability, that it should be given the widest possible application. *The truth is that the rule does but little to achieve the ends it supposedly serves.*
>
> • • •
>
> "The rule, then, does relatively little to deserve its much advertised virtue of reducing the dangers of successful fraudulent recoveries and defenses brought about through perjury. The rule is too small a hook to catch such a leviathan. *Moreover, if at times it does prevent a person from winning, by lying witnesses, a lawsuit which he should lose, it also, at times, by shutting out the true facts, unjustly aids other persons to win lawsuits they should and would*

lose, were the suppressed evidence known to the courts. Exclusionary rules, which frequently result in injustice, have always been defended. * * *"* (Italics ours.)

The petitioner, at pages 22 and 23 of its additional brief, contends that there was a contract in writing between the parties evidenced by the initial order (Pl. Ex. 1, Rec. 178); a letter from Todes to the petitioner (Pl. Ex. 2, Rec. 179), and a letter from the petitioner to Todes (Pl. Ex. 3, Rec. 179). The initial order was simply an unaccepted offer to buy the goods by the petitioner. Plaintiff's Exhibit 2, being the letter of Todes to the petitioner, was a quotation of the price and stated that the order was being cabled to Mexico. Plaintiff's Exhibit 3 was a confirmation of the quotation. All three of these instruments can only be construed as a continuing unaccepted offer of the petitioner to buy the goods, together with a memorandum of some of the terms of the offer to buy.

The letter of credit clearly indicated that the transaction was to be performed by the Mexican shipper, who would issue his own invoice directly to the buyer, together with the Mexican shipper's original bill of lading and other title and shipping documents.

These orders required acceptance by the Mexican shipper. The order was not accepted until shipment was made by the Mexican shipper directly to the petitioner.

The law is uniform and well settled that unaccepted orders are not within the Parol Evidence Rule. (*McCormick Harvesting Mach. Co.* v. *Richardson*, 56 N. W. 682; *Anderson Bros.* v. *Sioux Monument*, 232 N. W. 689; *Briggs* v. *Hilton*, 3 N. E. 51).

It is also well settled that a letter of credit is not part of the contract between a buyer and seller, but is an entirely separate and independent contract between the bank and the seller. (9 C. J. S. 388; *Jones* v. *Bond*, 217 Pac. 726, 727).

These three documents that the petitioner relies on as representing a written and integrated contract, were incomplete and ambiguous in the following other respects:

(a) Direct shipment from Mexico to Globe was omitted.

(b) The time of shipment from Mexico was omitted.

(c) The manner of shipping the merchandise by means of a railroad carrier was omitted.

(d) The manner, details and time of payment were omitted.

(e) The contents of the letter of credit which specified the production of the Mexican shipper's commercial invoice and bill of lading made to the order of the shipper were ambigious, contradictory and inconsistent with the original order which appeared to be addressed to International Industries.

We believe that it is clear beyond argument that the Circuit Court of Appeals was correct in stating in its original opinion that no written definitive contract was entered between the parties covering the transaction (Rec. 231).

11.

Direct Privity Between the Petitioner and the Mexican Shipper.

In its opinion on the petition for rehearing, the Circuit Court of Appeals indicated that the transaction was

one between the petitioner and the Mexican shipper. The court said in its opinion:

> "Neither can it be contended that the sale was not executed by delivery of the goods conditionally to the plaintiff. The plaintiff agreed to a conditional delivery and to accept such conditional delivery by agreeing to the shipment of the goods C. I. F. Laredo, Texas, on a bill of lading made to the order of the shipper, Gonzalo A. Larrea, and endorsed by the shipper in blank, and the goods to be shipped in bond subject to the right of the United States Customs Officers to inspect and accept or refuse admission of the goods to this country. When the plaintiff, with the letter of credit which it had authorized, took up the bill of lading under such circumstances, the sale was executed, and the title to the goods passed to the plaintiff. In any view of this case the court erred in sustaining the motion of the plaintiff for a directed verdict and also erred in overruling the motion of the defendants for a directed verdict" (Rec. 258, 259).

The contents of the letters of credit furnished by the petitioner to pay for the merchandise established that the petitioner was in direct privity with the Mexican shipper in the transaction. The letters of credit (Pl. Ex. 4; Rec. 180-181) required the production of the following title and shipping documents before payment would be made under the letters of credit: (1) Mexican shipper's commercial invoice; (2) Consular invoice in duplicate; and (3) Original bill of lading issued to order of Mexican shipper, blank endorsed, evidencing shipment of 750 cases of Tequila to Laredo, Texas.

Accordingly, the title and shipping documents were to be sent directly by the Mexican shipper to the petitioner, which proved the direct relationship between the two.

It has been held as a matter of law that "invoices" are written itemized accounts sent to a purchaser by a seller of merchandise. (*Merchants Exchange Co.* v. *Weisman*, 93 N. W. 869, 870; *Southern Express Co.* v. *Hess*; 53 Ala. 19, 22; *State* v. *Standard Oil Co.*, 271 N. W. 185, 187.)

The letters of credit also provided that they could be assigned and that drafts drawn against the letters of credit would be payable at The First National Bank of Chicago. The letters of credit were assigned and payment thereunder was made to The First National Bank of Chicago. Payment under the letters of credit was not made to the respondents, nor did they handle the proceeds representing the payment of the goods.

Under the terms of the letter of credit, everything was left to the Mexican shipper in order to make the transaction operative. The Mexican shipper not only had to ship the goods, but also had to comply with each and every one of the terms named in the letter of credit. The respondents had no discretion or power to control the transaction as the shipment of the goods and any liability under the letter of credit depended upon the consummation of the transaction by the Mexican shipper.

The undisputed facts in the transaction prove that the petitioner dealt with the respondents as the agents of the Mexican shipper, and since the latter shipped the goods directly to the petitioner, there was direct privity and an executed contract between the petitioner and the Mexican shipper.

12.

Globe Ordered Required Acceptance.

Until Globe's initial order was accepted by Larrea, and the latter communicated notice of his acceptance to Globe, Globe could withdraw its order or offer without incurring any liability under the order or letter of credit.

Petitioner's order and request (Pl. Ex. 1, Rec. 178) and the letter of Todes to the petitioner (Pl. Ex. 2, Rec. 179) prove that the petitioner's original order was a mere unilateral offer to purchase goods from a Mexican shipper and required the latter's acceptance. The order required its acceptance by the Mexican shipper before any binding contract would have commenced, and this condition also required the *communication* from the Mexican shipper to the petitioner of the acceptance of the order.

The mere acknowledgment of the reeeipt of the petitioner's order by the respondents was not an acceptance of the order. (*Krohn-Fecheimer Co.* v. *Palmer,* 221 S. W. 353; *Cheboygan Paper Co.* v. *Swigart Paper Co.,* 140 Ill. App. 314; 55 C. J. 107, Notes 9 and 10; *Harvey* v. *Duffey,* 33 Pac. 897.)

The rule requiring acceptance by a seller of a prospective buyer's offer to purchase before a binding contract can be entered into also applies even where the prospective buyer accompanies his order with a deposit of the purchase price in advance, so that before acceptance of the order by the proposed seller, the proposed buyer may withdraw his offer and the proposed seller may return the money, and no binding contract has been made. (46 Am. Jur. 239, Sec. 48, Note 6; *L. A. Becker Co.* v. *Clardy,* 96 Miss. 301, 51 So. 211, Ann. Cases 1912 B 355.)

The only act of acceptance of the petitioner's initial order by Larrea, the Mexican shipper, was by his actual shipment of the goods on May 22, 1944, consigned directly to the petitioner (Def. Ex. 7, Rec. 195). At any time before the goods were shipped, therefore, the petitioner could have withdrawn its offer to purchase without incurring any liability under its initial order or letter of credit.

13.

Disclosure of Shipper's Identity in Apt Time.

Assuming, but not conceding, that it was necessary for San Roman to disclose to Globe that the shipper's name was Larrea, San Roman made this disclosure in apt time.

It will be seen from our discussion under point 15 of brief that Illinois law does not require an agent to disclose the name of his principal in order for the agent to be absolved of personal liability.

The petitioner at pages 24, 25 and 26 of its additional brief has made an issue of the point as to the time of disclosure. It was unnecessary for the petitioner to argue this point as the petitioner was successful in inducing the trial judge to exclude from the evidence Defendants' Exhibits 4 and 5 for identification (Rec. 192-193), which notified the petitioner that the name of the Mexican shipper was Gonzalo A. Larrea, and his address and place of business was also included in this information.

Since the petitioner argued this point, which was based on excluded proof, we deem it necessary to answer it briefly. The name and location of the shipper was furnished to the petitioner *before* its order was accepted by the shipper and *before* the petitioner incurred any liability under the letter of credit.

Before the name and location of Larrea was furnished by the respondents to the petitioner, the petitioner could have withdrawn its unaccepted order and be free of any liability in the transaction including any liability under the letter of credit that it procured.

14.

Letter of Credit, Only When Acted Upon, Is Irrevocable.

A letter of credit is an independent offer of the issuer to purchase shipping documents and the offer does not become a contract until payment thereunder is requested, accompanied by the specified shipping or title documents attached, or the beneficiary performs some other act in reliance on the letter of credit.

The petitioner makes much of the fact that the letter of credit named the respondents as beneficiaries. However, the letter of credit was made assignable and payable at the First National Bank of Chicago, which acted as a clearing house in the transaction.

Unless and until the Mexican shipper would have shipped the merchandise and would have complied with each and every term specified in the letter of credit, it would have no more effect than a blank piece of paper, even though the letter of credit was labeled as being "irrevocable."

We repeat that it is undisputed that none of the money in the transaction was handled by the respondents. Petitioner admitted that it regarded the respondents as the agents in the transaction.

A letter of credit becomes "irrevocable" only when the beneficiary thereunder acts on it.

In 9 C. J. S. Section 176, page 385, Note 86, the following pertinent rule is stated:

> "If the letter shows that it was written for the purpose of being shown in order to obtain credit and the purchaser is within the terms of the letter, it amounts to an *offer* that, if he purchases the draft, it will be honored, and the *offer or promise becomes* a contract when the draft is negotiated." (Italics ours.)

In *Banco National* v. *First National Bank,* 289 Fed. 169, 174, the Court, in commenting on the nature of a letter of credit, held:

> "That offer or promise (letter of credit) became *a contract when* the draft is negotiated." (Italics ours).

This same principle was followed in *Moss* v. *Old Colony Trust Co.,* 140 N. E. 803, and *American National Bank and Trust Co.* v. *Banco,* 166 So. 8.

Applying the principles in the authorities just cited to the case at bar, it follows that there was no liability whatever to any person under the letter of credit until the merchandise was delivered to the carrier by the Mexican shipper on May 22, 1944. The letter of credit required production of the shipping and title documents as a condition to payment thereunder. These could not be produced until shipment was made.

Larrea, the Mexican shipper, did not accept the petitioner's order and the latter's order did not become a binding contract until Larrea shipped the goods on May 22, 1944. Therefore, at any time before the petitioner's order was accepted by the Mexican shipper, that is to say, at any time before the goods were shipped by the latter on May 22, 1944, the petitioner could have withdrawn its order without incurring any liability thereunder and could have requested the bank not to honor

any drafts drawn under the letter of credit as no rights of third parties had intervened.

Even if the petitioner had withdrawn its offer before it was accepted by the Mexican shipper and would have notified its bank not to honor any drafts under the letter of credit, and if the shipper would nevertheless have shipped the goods and demanded payment under the letter of credit, this would have constituted a fraud on the shipper's part and the bank would not have been under any duty to honor any drafts under the letter of credit.

In "Legal Aspects of Commercial Letters of Credit" (Finkelstein) published by the Columbia University Press in 1930, at page 248, the following applicable rule is set forth:

> "Where a bank (issuing a letter of credit) can show that the seller has acted fraudulently, it is under no duty to pay the seller."

(See also *Sztejn* v. *Schroeder*, 31 N. Y. S. (2d) 631).

In *Camp* v. *Corn Exchange Bank*, 132 Atl. 189, the Supreme Court of Pennsylvania held that a bank issuing a letter of credit had the right to heed a request of its customer to stop payment under a letter of credit for a reasonable period.

A letter of credit is a contract having the character of a guaranty. (24 Am. Jur. 888, Note 7, Sec. 20 and cases cited; *Lafargue* v. *Harrison*, 70 Cal. 380, 9 Pac. 259, 11 Pac. 636, 59 Am. Rep. 416).

Had the petitioner withdrawn its order before Larrea accepted it and so notified Larrea, no binding contract would have existed and the letter of credit would not have an obligation to guarantee. If a primary or principal obligation does not exist, there cannot be a contract of guaranty. (24 Am. Jur. 901, Note 3, Sec. 41). "With-

out principal debt, there can be no guaranty." (24 Am. Jur. 875, Notes 15, 16, 17, Sec. 4).

Suppose cash had been paid to the respondents as agent. The transaction then would not have been any different. Under those circumstances, until the Mexican shipper accepted the order, the deposit of the entire proposed purchase price with the respondents would have been under their status as agents. It is not unusual under certain market conditions for a prospective buyer to accompany his order with money in advance for the amount of the proposed purchase as an inducement for the seller to accept the order and ship the goods.

The furnishing by petitioner of a letter of credit was a continuation and part of its initial unaccepted order and can be regarded as "cash with the order," and the order was still subject to acceptance of the shipper. Had the petitioner withdrawn its order before the shipper accepted it and so notified the shipper, no binding contract would have existed under the letter of credit.

15.

Disclosed Agency Status Eliminates Personal Liability.

The petitioner dealt with the respondents knowing of their status as agents for the Mexican shipper. It was stipulated at the trial that Illinois law would govern the transaction. The Illinois authorities hold that an agent, in dealing with a third person, is liable personally only under the following circumstances:

(1) When an agent enters into a written or oral contract in his own name, and fails to disclose or conceals his *status* as an agent;

(2) When an agent enters into a complete and unambiguous *written* contract in his own name as principal and does not disclose his agency status;

(3) When an agent represents a non-existent principal;

(4) When an agent representing a disclosed or undisclosed principal pledges his own credit and expressly agrees to be personally bound by the contract.

The respondents were in none of these classifications.

Annes v. *Carolan, Graham, Hoffman, Inc.*, 366 Ill. 542, cited at page 24 of petitioner's additional brief, is not in point, as it involves an agent who did not have a principal at the time the supposed agent entered into the contract, and the supposed principal later repudiated the authority of his agent.

In *Wheeler* v. *Reed*, 36 Ill. 81, cited at page 24 of petitioner's additional brief, the opinion of the Supreme Court of Illinois points out in that case that the agent dealt *in his own name* as seller and as principal, and did not disclose his status as an agent.

In *Scaling* v. *Knollin*, 94 Ill. App. 443, cited at page 24 of petitioner's additional brief, a commission firm failed to disclose the fact that it was acting in an agency status and executed a bill of sale in its own name, and had possession of the goods in question. In *Trench* v. *Hardin County Canning Co.*, 67 Ill. App. 269, also cited at page 24 of petitioner's additional brief, a party entered into a contract in its own name and throughout the negotiations held itself out as principal and mentioned nothing about its status as agent. In *American Appraisal Co.* v. *Pio*, 246 Ill. App. 467, also cited at page 24 of petitioner's additional brief, that decision points out that an attorney con-

tracted for services as a principal, personally made payments on account from time to time, received bills from the seller from time to time without objecting thereto, and he did not disclose his alleged status as an agent.

In *Chicago Title & Trust Co.* v. *De Lasaux*, 336 Ill. 522, 526, the Illinois Supreme Court said:

> "Where an agent in making a contract discloses his agency and the name of his principal, *or* where the party dealing with the agent knows that the agent is acting as an agent in making the contract, the agent is not liable on the contract unless he agrees to become personally liable. (*Millikin* v. *Jones*, 77 Ill. 372; *Wheeler* v. *Reed*, 36 id. 81; *Chase* v. *Debolt*, 2 Gilm, 371)." (Italics ours).

As early as 1945, the Illinois Supreme Court decided this last cited case of *Chase* v. *Debolt*, 7 Ill. (2 Gilm.) 371. An agent named Chase, who was actually the agent of a bishop, also named Chase, hired one Debolt to perform work and labor and at the time he was orally employed by the agent, Chase, the latter did not tell Debolt that he, Chase, the agent, was acting for the bishop. As Debolt was performing his work, he learned the fact that the agent actually was representing the bishop when Debolt was hired. In a suit by Debolt against Chase (the agent), the latter was held not liable for the work and material furnished by Debolt. At page 375 of this opinion, the Supreme Court of Illinois said:

> "Agents may become liable for contracts made for their principals, where they conceal or do not disclose their character or agent, and it is unknown to the party with whom they contract, and they may also by the nature and character of the contract entered into. But it is quite immaterial whether the agent discloses *his character or his principal*, himself, if it be actually known at the time to the other party. In such case the agent will *not* be bound, *unless he*

enter into such a contract as will bind him at all events." (Italics ours).

It is significant that this *Chase* v. *Debolt case,* 7 Ill. (2 Gilm.) 371, has not been overruled or modified in any respect and was cited and followed by the Illinois Supreme Court as late as 1929 in the previously cited case of *Chicago Title & Trust Co.* v. *De Lasaux,* 336 Ill. 522, This *Chase* v. *Debolt* case is also important because it establishes a fundamental principle of agency if a third person deals with an agent knowing his status as an agent, whether the agent does or does not disclose the name of his principal, the agent is not liable, personally, *unless the agent expressly agrees to be bound personally.*

The fallacious contention is often made, and probably will be made by the petitioner in its reply brief, that an agent who discloses his status as an agent but acts for an unnamed or undisclosed principal is personally liable in the transaction. That is not the law in Illinois. The authorities cited in this section of our brief include authorities that go back as far as 1845. All of them enunciate the basic principle that a third person who deals with an agent *as an agent* for a disclosed or undisclosed principal cannot hold the agent liable personally, *unless the agent expressly agrees to be bound personally, or unless the agent has entered into a complete unambiguous written contract in his own name as principal.*

This basic rule of the non-liability of an agent who discloses his *status as an agent* has also been followed by courts of other jurisdictions. A case in point is one decided by the Supreme Court of Texas, *Johnson* v. *Armstrong,* 83 Texas 325; 18 S. W. 594; 29 Am. St. Rep. 648. This concept of agency in *Chase* v. *Debolt,* 7 Ill.

(Gilm.) 371, was recognized by Tiffany on Principal and Agent (1903 Ed.), where at page 363 that author, in commenting on an undisclosed or unnamed principal states:

> "By failing to disclose (the agency) he (the agent) assumes the risk of being bound; *but if the other party actually knows*, although from some other source, that the agent is contracting as such, and *he does not expressly bind himself*, the principal only is bound." (Italics ours).

This same rule of agency was also recognized in Anson on Contracts (1906 Ed.), where, at page 428 (note 1), of that authority, it is stated:

> "An agent who contracts for an *unnamed* principal *as agent* will *not be liable personally.*" (Italics ours).

In *Warren* v. *Dickson*, 27 Ill. 115, the Suprem Court of Illinois followed this same principle of agency. At page 118 of that opinion, the Court said:

> "This instruction was clearly wrong, for the plaintiffs may have known perfectly well, that the defendant was getting the lumber for another, and not on his own account. In such a case, it surely was not necessary for the defendant to disclose his agency. If the plaintiffs knew that fact, why disclose it, on receiving the lumber? The instruction shuts out of view this consideration."

In *Millikin* v. *Jones*, 77 Ill. 372, at page 375 of that opinion, the Court held that the following instruction as corrected by the trial court correctly stated the law as to the personal liability of an agent. At page 375 of this opinion, the Court stated:

> "The Court further instructs, for the defendant, that, if it appears, from the evidence, that, in hiring the pasture, Millikin acted as the agent of Frank Calhoun, then, *it is immaterial whether the defendant disclosed his character* or his principal, if they

believe, from the evidence, that plaintiff, Jones, knew, at the time, that Millikin was acting in such character as agent.

"To which the court added:

"Unless the jury believe, from the evidence, that notwithstanding Millikin was acting as the agent of Calhoun, he, also, by his alleged agreement, *bound himself to become responsible for said pasturage, or some portion of it.*" (Italics ours).

In *Savage* v. *Stewart,* 226 Ill. App. 388, the Court passed on the personal liability of an agent in a transaction. At page 393 of that opinion, the Court said:

"An agent is not liable on a contract made on behalf of his principal if, in fact, the other party knew of the agency (*Warren* v. *Dickson,* 27 Ill. 115; *Marckle* v. *Haskins,* 27 Ill. 382; *Siegel* v. *People,* 106 Ill. 89), and it is only where the agent contracts as principal and does not disclose that he is acting as agent that the agent becomes personally liable as principal. *Weil* v. *Defenbaugh,* 65 Ill. App. 489; *Trench* v. *Harding County Canning Co.,* 67 Ill. App. 269; *Leohde* v. *Halsey,* 88 Ill. App. 452; *Geiselman* v. *Roddinghaus,* 158 Ill. App. 316. Under the evidence appellee was not liable on this contract as principal."

Hypes v. *Griffin,* 89 Ill. 134, cited at page 23 of the petitioner's brief is not applicable to the suit at bar, because the note in question there was a complete written and unambiguous contract in writing that could not be modified by parol evidence. The note in that case did not contain the promise of the Methodist Episcopal Church of Lebanon to pay the note, but in the body as well as the signature of the note, the persons who happened to be the trustees of the church, *promised individually* to pay the note.

The authorities cited in this section of our brief establish the well-settled rule of law in Illinois that if a

third person deals with an agent who discloses his status as an agent, the agent is not bound personally, even if he fails to disclose the identity of his principal, *unless the agent expressly agrees to be bound personally.* In the suit at bar, there was a total failure of the petitioner's proof on this point.

It is definitely settled under the Illinois cases that the respondents could not be liable in this transaction because of their agency status, *in the absence of proof that they agreed to be personally liable. No such proof exists.*

This agency point is collateral to the main and decisive question in the case, namely, even if the respondents had been principals, that is to say, sellers in the transaction, the decision of the Circuit Court of Appeals was proper, because the petitioner failed to prove the existence of an express warranty of quality, upon which its entire claim rested.

16.

The Decision of the Circuit Court of Appeals Was Just and Fair.

Had the petitioner accepted the offer of the Mexican shipper to recondition the goods at his own expense, the original contract would have been fully performed and no one would have been damaged.

The petitioner dealt with the respondents and recognized them as being agents or brokers. The trial court commented on Lazarus' testimony that he, Lazarus, referred several times to the broker status of the respondents (Rec. 106). Lazarus admitted receiving a telegram from the Mexican shipper whereby the latter agreed to filter and re-bottle the merchandise at his own expense (Rec. 104). The petitioner was so anxious to procure the merchandise that it *paid* Todes a separate finder's com-

mission (Rec. 96). Had the petitioner accepted the offer of the Mexican shipper to recondition the goods at his own expense, the contract would have been fully performed and no one would have been damaged. During the period in question foreign importations of liquor were frequently found to be defective and thousands of cases were reconditioned under United States Government supervision and released to the public.

17.

CONCLUSION.

The petitioner admits that the record does not contain any conflicting evidence. No complaint has been made by the petitioner that there was any erroneous or improper evidence admitted in the record in behalf of the respondents. None of the evidence introduced by the petitioner in the trial court was improper so that any part of it requires correction or supplanting.

The petitioner had ample opportunity to prove the existence of the basis for its claim, namely, that an express warranty of quality existed in the transaction.

The entire claim of the petitioner was based solely on an express warranty. It was therefore too late for the petitioner to rely on an alleged implied warranty for the first time after the case was argued in the Circuit Court of Appeals. The Circuit Court of Appeals held correctly that not an iota of proof in support of this alleged express warranty was offered in evidence so that it became immaterial whether the respondents were principals or agents. The Circuit Court of Appeals also held correctly that the undisputed facts in the transaction show that there was direct privity beween the petitioner and the Mexican shipper, and that the peti-

tioner dealt with the respondents as the agents of the Mexican shipper.

The petitioner itself excluded from the record the Todes deposition, which the petitioner now asserts proves that the respondents were dealers. Even this contention is incorrect, because the entire deposition of Todes proves the contrary, namely, that the respondents were only the agents of the Mexican shipper, and that every order received by the respondents would in turn be sent to the Mexican shipper for his acceptance and confirmation.

It is undisputed that the respondents did not have possession of the goods, see the goods, handle them, or have anything to do with the goods, and that all shipments were made directly from the shipper in Mexico to the buyers in this country.

Under the settled decisions of Illinois there is no implied warranty of merchantability of goods sold under a trade name. Moreover the alleged existence of an express warranty excludes any implied warranty as to the same factors. The petitioner was so anxious to get the merchandise that it paid Todes a finder's commission of $750.00 in its anxiety to have its order accepted by the Mexican shipper.

In view of the Mexican shipper's offer to recondition the goods, it would be manifestly unfair and grossly unjust to saddle a liability of approximately $10,000 on the respondents who did not see, handle or have anything to do with the goods.

The repeated defense of the respondents that they refused to warrant the goods because of their agency status, was consistently called to the atention of the trial court and the petitioner. Until the petitioner would prove the alleged express warranty, the respondents were

under no duty to prove their defense that they refused to warrant the goods.

The grounds of the respondents' motion for a directed verdict, in view of their oral arguments in support of the motion, and their previous arguments in the case, were a sufficient compliance with Rule 50 (a) of the Federal Rules of Civil Procedure that grounds for a motion for a directed verdict should be specific.

Inasmuch as only questions of law were involved on the undisputed facts in the record in this case, the respondents' motion for a directed verdict should have been allowed by the trial court. Since the trial court, instead, peremptorily allowed the petitioner's motion for a directed verdict and a judgment thereon, it was unnecessary under Rule 50 (b) of the Federal Rules of Civil Procedure for the respondents to have filed a motion for judgment notwithstanding the verdict in the trial court.

Even if Rule 50 (b) applied to the instant suit, it was fully complied with when the respondents filed their detailed motion for a new trial which, in accordance with the reasoning in the *Cone* case, afforded the trial court the same last chance to correct his errors as he would have had if the respondents had filed a motion for judgment notwithstanding the verdict.

Inasmuch as questions of law only were involved on undisputed facts in the record, and since the result by the Circuit Court of Appeals was not only correct, but just and equitable, and since it is clear that the Circuit Court of Appeals had full power to make a final disposition of the case, we believe that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

NAT M. KAHN,

Attorney for Respondents.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 205

GLOBE LIQUOR COMPANY, INC., A Corporation,
Petitioner,

vs.

FRANK SAN ROMAN AND DOROTHEA SAN ROMAN, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF INTERNATIONAL INDUSTRIES,

Respondents.

PETITIONER'S PETITION FOR REHEARING AND FOR STAY OF MANDATE PENDING ITS DETERMINATION.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now Comes Globe Liquor Company, Inc., petitioner, by its duly authorized attorneys, Ben W. Heineman and Joseph D. Block, and presents its petition for a rehearing in these proceedings and for a stay of mandate pending its determination. In support of this petition, the undersigned respectfully show:

This Court, in its opinion rendered on January 5, 1948, failed to review the action of the Circuit Court of Appeals in holding that no part of the Todes deposition had been

read or considered as read in evidence. This issue was left unresolved despite the fact that it was properly preserved for review in this Court (Pet. for Cert. 7-8) and despite the fact that the allowance of the petition for certiorari was unlimited in scope. Under such circumstances, it is established that this Court is under a duty to review the material and substantial questions presented. In *Camp* v. *Gress*, 250 U.S. 308, 318 (1919), this Court, speaking through Mr. Justice Brandeis, said:

> "*Fourth.* [illegible] D. and P. R. Camp contend, however, that the judgment against them should be reversed also on the ground that there was error in the instructions as to the measure of damages. The contention must be examined, as the whole case is here on writ of certiorari and the objection was properly saved. *Latcher & Moore Lumber Co.* v. *Knight*, 217 U.S. 257, 267; *Delk* v. *St. Louis & San Francisco R. R. Co.*, 220 U.S. 580, 588."

See also *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 567-8 (1931). And as recently as *Blumenthal* v. *United States*, (Oct. Term, 1947, Dkt. Nos. 54-57, decided December 22, 1947), this Court said:

> "We did not limit our grant of certiorari to that question, however, and on the record it is inseparably connected with the other issues, which relate to the admissibility and sufficiency of the evidence. Accordingly we have considered all of petitioners' contentions."

As this Court notes in its opinion, the Circuit Court of Appeals disposed of the case upon the assumption "that no part of the deposition was ever admitted as evidence". That issue is one which this Court is fully as competent to decide as the Circuit Court of Appeals. It involves merely an examination of the printed record. In that determination no questions of local law are involved. And in view

of the limited amount in controversy and the extended litigation that has already been required, the decision of this issue by this Court is necessary in the interests of justice and sound judicial administration.

If upon a consideration of this issue this Court determines that the Circuit Court of Appeals erred in refusing to consider the Todes testimony, the merits of this litigation would then be presented for decision. In such a case it would be wholly appropriate for this Court to remand the proceedings to the Circuit Court of Appeals with a direction to that court to pass upon the merits. If the judgment of the District Court is correct, the petitioner should be granted an opportunity in this manner to sustain that judgment without being compelled to retry the case *de novo*.

Similarly, if this Court should regard the record as ambiguous on the question of whether or not the Todes testimony was admitted in evidence, the remedy that does substantial justice is not an affirmance of the judgment entered by the Circuit Court of Appeals. Rather, the appropriate remedy is a remand to that court with a direction to grant the petitioner's motion under Rule 75(h) to remit the record to the District Court for its certification as to whether the Todes testimony was in fact admitted into evidence (R. 268, Pet. Br. 14, fn. 8). This procedure would also provide the petitioner with an opportunity of sustaining the judgment of the District Court without the expense of a new trial.

A new trial at this stage of the litigation is appropriate only in the event that it be ultimately determined that the Todes testimony was not admitted into evidence or if, upon a consideration of the merits, it be determined that the District Court improperly directed a verdict for the petitioner.

WHEREFORE, for the foregoing reasons, it is respectfully urged that upon rehearing:

1. This Court review the determination of the Circuit Court of Appeals that no part of the Todes deposition had been read or considered as read in evidence and in the event of a determination contrary to that of the Circuit Court of Appeals, remand these proceedings to the Circuit Court of Appeals for a decision upon the merits; *or in the alternative*

2. This Court remand these proceedings to the Circuit Court of Appeals with instructions to grant petitioner's motion to remit the record to the District Court for a certification pursuant to Rule 75(h) as to whether the portions of the Todes deposition relied upon were in evidence and, if the certification be in the affirmative, to pass upon the merits, and

3. A new trial be ordered in the event either that the Todes testimony relied upon be determined not to be in evidence or that the determination of the Circuit Court of Appeals upon the merits be adverse to the contentions of petitioner.

4. The mandate of this Court be stayed pending a determination by this Court of this petition for rehearing.

Respectfully submitted,

/s/ BEN W. HEINEMAN,
/s/ JOSEPH D. BLOCK,
Attorneys for Petitioner

SWIREN HEINEMAN & ANTONOW
Suite 1406
135 South LaSalle Street
Chicago 3, Illinois
Of Counsel

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

The undersigned, Ben W. Heineman, does hereby certify that he is one of the attorneys for the petitioner herein, that he has read and is familiar with the within and foregoing petition for rehearing and that the same was filed in good faith and not for purposes of delay.

/s/ BEN W. HEINEMAN

Ben W. Heineman

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FILED
CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 205

GLOBE LIQUOR COMPANY, INC., A Corporation,
Petitioner,

vs.

FRANK SAN ROMAN and DOROTHEA SAN ROMAN,
Doing Business Under the Firm Name and Style of International Industries,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' PETITION FOR REHEARING AND RESPONSE TO PETITIONER'S PETITION FOR REHEARING.

NAT M. KAHN
33 South Clark Street
Chicago 3, Illinois
Attorney for Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES

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RESPONDENTS' PETITION FOR REHEARING AND RESPONSE TO PETITIONER'S PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come Frank San Roman and Dorothea San Roman, doing business under the name and style of International Industries, the respondents, by Nat M. Kahn, their attor-

ney, and present their petition for a rehearing in this suit and their response to petitioner's petition for a rehearing.

Respondents present the following summarized reasons for their petition for rehearing, which are briefly amplified later. These summarized points are:

(1) No matter how many times this case might be retried, since the basic and essential facts are undisputed and fully developed, the ultimate result will be the same, namely, that the respondents do not owe the petitioner anything, as the respondents refused to warrant the goods, and the petitioner cannot recover on either an express or an implied warranty.

(2) This Court apparently overlooked the well-settled rule that the respondents' motion for a new trial exercised the same function as a motion for judgment under Rule 50(b) of the Federal Rules of Civil Procedure, so that the trial court had the same "last chance to correct his own errors without the delay, expense or other hardships of an appeal."

(3) This Court should have ruled under its own decisions, that no part of the deposition of Todes was admitted in evidence as the record is clear and conclusive that no part of these depositions were read to the jury.

(4) This Court overlooked in its decision in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212, and in its decision in the instant suit, the important factor that under Rule 50(b) a trial court, *on its own motion*, may grant a previously reserved motion for a directed verdict for a party after the verdict of the jury is received, *without a post-verdict motion* of either party. Therefore, since the trial court has this power, the Circuit Court of Appeals, on appeal, has the same power.

1.

Retrial of Instant Suit Is Unnecessary and a Burden.

No matter how many times this case might be tried, the result would be the same as the ultimate facts are undisputed and fully developed.

The facts as found by the Circuit Court of Appeals in its opinion are that there was direct privity between the petitioner and the Mexican shipper in the transaction, the respondents were the agents of the Mexican shipper, and there was no express warranty given by respondents to the petitioner.

In addition to these facts as determined by the decision of the Circuit Court of Appeals in the instant case, the record is also clear and undisputed that the shipper made a prompt offer to recondition the goods at his own expense, so that the petitioner would have received all it was entitled to under its bargain. No implied warranty can ever be established in this case because of the conclusive admission of Lazarus, the petitioner's vice-president, that the respondents refused to warrant the goods. Although this admission technically was not admitted in evidence because it was not read to the jury, it is a part of the printed record.

The trial court rejected a proper offer of proof that the net commission of the respondents in the transaction was $342.16 (Rec. 166). Although this evidence was also not technically admitted in evidence, it too is contained in the printed record. It is manifestly unjust for the petitioner to try to saddle a liability of $10,000 on the respondents when the petitioner admitted on several occasions during the course of the trial that it dealt with the respondents as agents. (Rec. 96, 106.)

We believe that under the undisputed facts in this case, a retrial or retrials of this case would be useless and an unnecessary gesture and burden, and that the result of any re-trial would always be the same as that reached by the Circuit Court of Appeals, whether the entire Todes deposition or part of it are considered as having been introduced in the evidence.

2.

This Court apparently overlooked the well-settled rule that the respondents' motion for a new trial exercised the same function as a motion for judgment under Rule 50 (b) of the Federal Rules of Civil Procedure, so that the trial court had the same "last chance to correct his own errors without the delay, expense and other hardships of an appeal."

This point was apparently overlooked by Your Honors in its decision in the instant suit. This "last chance" theory is not spelled out in Rule 50(b) of the Federal Rules of Civil Procedure and is foreign to the wording, history and purposes of the rule, and has been engrafted into the rule by judicial fiat.

The main purpose of Rule 50(b) was to prevent the hardships and expense of re-trials arising from trial courts granting motions for directed verdicts without permitting the jury to make an independent determination of the facts by its verdict. Under Rule 50(b) a party's motion for a directed verdict at the conclusion of all the evidence is always deemed automatically reserved, so that after a jury's verdict is received, the trial court, *on its own motion* while it has jurisdiction of the case, or the parties, by independent motion, within ten days after the reception of a verdict, may make the post-verdict motion provided for under the rule. In this fashion, the

jury's independent determination and verdict on the facts is received and preserved, and if the trial court, either *on its own motion* or on a post-verdict motion of a party, grants a party's previously reserved motion for a directed verdict regardless of the jury's verdict, the Circuit Court of Appeals, on appeal, can make a final disposition of the case without the hardship and expense of re-trials. This was the main and primary purpose of Rule 50(b) and not the "last chance" theory which has been advanced by Your Honors in its decision in the case of *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212, and by this Court's decision in the instant suit.

This Court has overlooked the vital and significant factor that a trial court, *on its own motion*, without the post-verdict motion of either party, can disregard the jury's verdict and enter judgment in favor of the party against whom the jury's verdict was found. (*Western Union Telegraph Co.* v. *Dismay*, 106 F. (2d) 363; *Lux* v. *Western Casualty Co.*, 107 F. 1002; *Demers* v. *Railway Express Agency*, 108 F. 107.)

Obviously, if a trial court has the power, *on its own motion, without the post-verdict motion of either party*, to disregard the jury's verdict and grant a party's previous motion for a directed verdict, we believe it must and should follow that the Circuit Court of Appeals has the same power.

Before the new rules of Civil Procedure went into effect, this Court held in *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, that the Circuit Court of Appeals had the power to reverse the judgment of the District Court and to enter judgment of dismissal on the defendant's motion for a directed verdict, which had been denied by the trial court, and in that case it appears from the opinion that no motion for judgment was made by the appellant in the

trial court. Therefore, it becomes increasingly difficult to understand how a rule of the District Court can destroy the well-settled, historical and statutory power of the Circuit Court of Appeals to make final disposition of a suit where only questions of law are involved. The Federal Rules of Civil Procedure do not apply to Circuit Courts of Appeals. (*Bethlehem Shipbuilding Corporation* v. *National Labor Relations Board*, 120 F. (2d) 126.)

However, if a post-verdict motion is required under Rule 50(b) to give the trial court a last chance to correct his errors and save the hardship and expense of an appeal, logic and common sense impels the conclusion that a *specific* and *detailed* motion for a new trial performs the same function as to the last chance theory of the trial court that is performed by a post-verdict motion for judgment. To begin with, a motion for a new trial must be specific. A motion for judgment need not be specific as it automatically refers to the previously reserved motion for a directed verdict. The post-verdict motion for judgment can consist of four words, such as "Defendant moves for judgment." The important point is that the previously reserved motion for a directed verdict is the basis of a party's right to a final disposition in his favor.

The respondents' motion for a new trial in the instant case not only embraced, but amplified, the respondents' previous motion for a directed vedict. Consequently, regardless of the label "new trial" designated in respondents' post-verdict motion, the legal significance of the motion for a new trial under Rule 50(b) was the same and even more than the meaningless ritual in the instant suit that the respondents would have performed had they filed a paper saying "Defendants move for judgment."

In the *Cone* decision this Court predicated its last chance theory on *Greer* v. *Carpenter*, 323 Mo. 878, 882, 19

S. W. (2d) 1046, 1047. This last chance theory is the crux of the *Cone* decision. The *Greer* case indicates by a reference to other cases, that a trial court has this last chance to correct its errors by a motion for a new trial.

In *Maplegreen Co.* v. *Trust Co.*, 237 Mo. 350, 141 S. W. 621, 624, which is cited in the *Greer* case, the Supreme Court of Missouri said:

> "2. (b) A motion for a new trial in the system now in vogue fills a substantial and useful office in administering justice through the courts. Questions are suddenly sprung on a trial judge by versatile and ingenious counsel during the hotfoot of a trial, which he perforce must decide without taking time to consider. No mortal judge is allowed to be so incomparably recondite and ready as to know all the law all the time. If he know all the law some of the time, or some of the law all of the time, or some of the law some of the time (thereby putting himself outside of the class of those who know none of the law, none of the time), he rises to a permissible high-water mark of excellence. Accordingly the office of a motion for a new trial is to gather together those rulings complained of as erroneous, and solemnly and formally present them, one by one, in black and white to the judge, in order that he have a last chance to correct his own errors without the delay, expense, or other hardships of an appeal. This on the theory that even a judge is entitled to a last chance—a locus pœnitentiæ. Furthermore, the office of that motion has come to be to preserve and fix errors to be reviewed in the record, to mark them for review, by another ruling on the motion itself, on which, when exception is taken and preserved, the whole matter is brought up for correction."

At page 11 of our additional brief, we cited other causes that establish the well-settled rule that one of the functions of a new trial is to afford the trial court a last chance to correct his own errors without the delay, expense, or other hardships of an appeal.

March v. *Philadelphia & Westchester Traction Co.*, 285 Pa. 413, 418, 132 A. 355, 357, cited in the *Cone* decision indicates that a motion for a new trial exercises the same function as a motion for judgment notwithstanding the verdict, in giving the trial court a last chance to correct his errors. In that case, the defendant moved for judgment notwithstanding the verdict, but did not file a separate motion for a new trial. The trial court in that case dismissed the motion for judgment, but granted a new trial.

In the case at bar, the trial court was told repeatedly throughout the course of the case of the respondents' basic defense that they refused to warrant the goods because of their agency status, and because they did not see or handle the goods. This basic defense was contained in the respondents' opening statement, their amended answer, and in their arguments on various motions during the hearing. This basic defense was ignored consistently and repeatedly by the trial court. It was again repeated in the post-verdict motion for a new trial filed by the respondents. The trial court then had the identical opportunity to correct his erroneous rulings as he would have had if the respondents had gone through a meaningless ritual of saying on paper "Defendants move for judgment." The respondents' detailed motion for a new trial was a more pointed warning to the trial court of his erroneous rulings than this mere lip service, diluted motion for judgment would have been.

Although the respondents' motion for a new trial referred to "contested issues of fact," this was a mistaken description of those issues at the time the motion was filed in the trial court, as it is now clear beyond all doubt that there are no contested issues of fact. It is obvious that respondents' motion for a new trial was a last chance

and attempt to salvage at least a new trial from a hostile judge who had erroneously ruled against the respondents on practically every ruling during the course of the trial.

Under these circumstances, we believe it becomes "curiouser and curiouser," in the words contained in *Alice in Wonderland*, and reaches the realm of pure fantasy to expect a trial judge to suddenly see the light and correct his errors by a four word motion "Defendants move for judgment," and not see the same light in a detailed motion for a new trial, which specifically points out his errors and gives him the chance to correct them.

We therefore believe that if Your Honors still hold that a post-verdict motion is necessary under Rule 50(b) to empower the Circuit Court of Appeals to make a final disposition of a case on appeal, this post-verdict motion, in the language of the *Cone* case, can be "either/or," that is to say, *either* a motion for judgment *or* a motion for new trial, particularly a motion for new trial that is detailed and specific. In the instant suit, the respondents, in apt time, made a post-verdict motion for a new trial that specifically called the court's attention to its errors and gave the trial court a last chance to correct his errors without the delay, expense, or other hardships of an appeal, so that the Circuit Court of Appeals did have full power to make a final disposition of the instant suit.

3.

This Court should have ruled under its own decisions, that no part of the deposition of Todes was admitted in evidence as the record is clear and conclusive that no part of these depositions were read to the jury.

This Court, in its initial decision in the instant suit, said:

> "Furthermore, the very circumstances which arose in this case emphasize the importance of having the District Court first pass upon whether its error should result in a new trial or in a judgment finally ending the controversy. For there is here a dispute between the parties whether all or certain parts of a deposition containing important evidence were properly introduced in the trial court. Both parties took the position in the Circuit Court of Appeals that some, though different portions of the deposition, were properly presented in evidence. The Circuit Court of Appeals decided the case on the assumption that no part of the deposition was ever admitted as evidence. In this Court respondents argue that no part of the deposition was ever read to the jury and therefore no part of it can be considered as introduced in evidence. Whether this deposition or any part of it was properly before the court, and even if it were not before the court, whether the ends of justice required that a new trial be granted in order that the evidence it contained might properly be offered, were questions which the petitioner was entitled under Rule 50(b) to have passed upon in the first instance by the trial court."

In the instant suit, how could a four-word motion "Defendants move for judgment" have induced the trial judge to make any other ruling on the Todes depositions? To begin with, there was no controversy between the parties concerning the nature of the trial court's rulings on the Todes deposition until *after* the Circuit Court of Appeals had rendered its first decision (Rec. 230-232). There was no controversy about the Todes deposition in the minds of either the trial court or any of the parties *during the trial court proceedings* as to what parts of the deposition the trial court stated was introduced in evidence. Merely because a controversy arose *later* between the parties *on appeal* as to the *legal effect* of what happened in the trial court concerning the depositions, in view of the completeness of the record in the

instant suit, this Court under its own decisions has the power to make a complete and final ruling as to the legal effect of these depositions. It is clear beyond all doubt that no part of the depositions was ever read to or before the jury. This is undisputed and beyond any controversy. Merely because the parties, on appeal, indulged in a controversy as to the *legal effect* of certain rulings of the trial court concerning the depositions, this later dispute on appeal does not present a controversy as to the existence, omission or availability of the facts. All the facts in the entire deposition were before the trial court. This debate about the depositions is not of the same character as the element of the existence of an important missing witness, as in *Bunn* v. *Furstein*, 153 Pa. Super., 637, 638, 34 A. (2d) 924, cited at page 216 of this Court's decision in the *Cone* case. In the *Bunn* case not only was the trial court cognizant of the missing witness, but the entire decision was based on this element.

This legal argument in the instant suit about the depositions is entirely foreign to the factor of erroneous evidence introduced by the plaintiff in the *Cone* case, which might be corrected or supplanted by a new trial. This controversy about the depositions in the instant suit is not in the same class as that character of cases pointed out by Your Honors in the *Cone* case where a trial court is about to direct a verdict because of the failure of proof in a certain aspect of the case and at that time the litigant might know or have reason to believe that he could fill a crucial gap in the evidence.

Even if the entire Todes deposition had been admitted in evidence by the trial court, or if the entire Todes deposition might be admitted in evidence on a retrial of this case, because of the undisputed facts in the case, the result would still be the same as that determined by the Circuit Court of Appeals, so that the petitioner would have

no valid claim against the respondents. No matter how many times this case might be retried, the admission of Lazarus is conclusive and decisive, that the respondents refused to warrant the goods. The pettiioner was so anxious to procure the goods that it purchased the merchandise through the respondents as agents, with the distinct understanding and agreement that the respondents refused to warrant the goods. The petitioner was so anxious to get the goods that it paid Todes, respondents' salesman, a separate substantial finder's commission.

We believe Your Honors should issue a supplemental or modified opinion in the instant suit holding that the Circuit Court of Appeals was correct in deciding that no part of the Todes deposition was properly introduced in evidence as no part of the deposition was read to the jury. There can be and there is no controversy about this. (*Barney* v. *Schmeider*, 9 Wall. 246, and *Hodges* v. *Easton*, 106 U. S. 408.)

4.

This Court overlooked in its decision in Cone v. West Virginia Pulp & Paper Co., 330 U. S. 212, and in its decision in the instant suit, the important factor that under Rule 50(b) a trial court, on its own motion, may grant a previously reserved motion for a directed verdict for a party after the verdict of the jury is received, without a post verdict motion of either party. Therefore, since the trial court has this power, the Circuit Court of Appeals, on appeal, has the same power.

We do not believe that this point was argued in the *Cone* case. We touched on this point in our discussion under Point 2 of this petition for rehearing.

We believe it is clear from the very wording and purpose of Rule 50(b) that it is not mandatory for a party to make a post-verdict motion in order to have the trial court grant the movant's previously reserved motion for a directed verdict. Under the specific wording of Rule 50(b), even if a motion for a directed verdict is denied before the case goes to the jury, it is deemed automatically reserved to await the court's subsequent ruling after the jury's verdict is received. It is therefore a natural act for the trial court immediately or shortly after a jury's verdict is received, to rule *on its own motion* in a proper case that it will grant in a proper case a party's motion for a directed verdict, regardless of the jury's verdict. This practice is well settled and has been followed by various courts since the adoption of Rule 50(b). (*Western Union Telegraph Co.* v. *Dismay*, 106 F. (2d) 353; *Lux* v. *Western Casualty Co.*, 107 F. 1002; *Demers* v. *Railway Express Agency*, 108 F. 107.)

Now, if the trial court has this power without any post-verdict motion by a party to the suit, we believe it must follow that in a case involving questions of law only on undisputed facts, that the Circuit Court of Appeals has the same power and can make a final disposition of the case. A post-verdict motion by a party, if the motion is specific, as a motion for a new trial must be, certainly assists the trial court in passing on the previously reserved motion for a directed verdict, whereas the same general, diluted motion saying "Defendants move for judgment" is of no assistance to the trial court.

In view of the matters set forth under this Point 4 of our petition for rehearing, we believe Your Honors should modify the holding in the *Cone* case and in the instant suit, that if a post-verdict motion is necessary under Rule 50(b) in order to empower the Circuit Court of

Appeals to make a final disposition of the case in cases involving only questions of law where the facts are undisputed, the Circuit Court of Appeals can make a final disposition of the case where the appellant has filed *either* a motion for a new trial *or* a motion for judgment.

In the instant suit, the respondents having filed a detailed motion for a new trial, the trial court had full and complete opportunity to correct his errors without the delay, expense, or other hardships of an appeal.

Response to Petitioner's Petition for Rehearing.

The petitioner's petition for rehearing suggests a partial, piece-meal handling of this case, which is in the "heads I win, tails you lose" category. As we pointed out previously, even if the entire deposition is considered as having been introduced in evidence, the ultimate facts in this law suit would be the same as determined by the Circuit Court of Appeals. Moreover, under the very cases decided by this Court and cited frequently by the petitioner in its briefs, no part of the Todes deposition was ever introduced in evidence, because none of the depositions were read to the jury. (*Barney* v. *Schmeider*, 9 Wall. 246, and *Hodges* v. *Easton*, 106 U. S. 408.)

We agree with the statement contained in petitioner's petition for rehearing at page 2, that:

> "As this Court notes in its opinion, the Circuit Court of Appeals disposed of the case upon the assumption 'that no part of the deposition was ever admitted as evidence.' That issue is one which this Court is fully competent to decide as the Circuit Court of Appeals. It involves merely an examination of the printed record."

For the foregoing reasons, the undersigned respectfully requests that the petitioner's petition for rehearing be denied and that the respondents' petition for rehearing should be allowed, so that this Court should modify its initial opinion in the instant suit and hold that the respondents' motion for a new trial was a compliance with Rule 50(b) of the Federal Rules of Civil Procedure, and that the Circuit Court of Appeals had the power and jurisdiction in reversing the judgment of the trial court, to remand the case to the District Court, and to direct that court to enter a judgment in favor of the respondents.

Respectfully submitted,

NAT M. KAHN,
Attorney for Respondents.

I, Nat M. Kahn, attorney for the respondents, do hereby certify that the foregoing petition for rehearing has been presented in good faith and not for the purpose of delay.

/s/ NAT M. KAHN
NAT M. KAHN.

p. 3.

SUPREME COURT OF THE UNITED STATES

No. 205.—October Term, 1947.

Globe Liquor Company, Inc., Petitioner, v. Frank San Roman and Dorothea San Roman, doing business under the firm name and style of International Industries.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 5, 1948.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner, Globe Liquor Company, Inc., brought this action in Federal District Court against respondents, Frank and Dorothea San Roman, doing business under the name of International Industries. The complaint claimed damages for an alleged breach of warranty in the sale of certain liquors. An answer was filed; issues were appropriately joined. After all the evidence had been introduced, each party requested a directed verdict. The petitioner's motion was granted, verdict was returned in its favor, and judgment was accordingly entered. The respondents then moved for a new trial on the ground among others that there were many contested issues of fact which should have been submitted to the jury. They did not move for judgment under Rule 50 (b) of the Federal Rules of Civil Procedure, which provides in part: "Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; . . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned

the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed." On appeal the Circuit Court of Appeals not only set aside the judgment in favor of the petitioner but also remanded the case to the District Court with directions to enter judgment for the respondent. 160 F. 2d 800. We granted certiorari to consider the apparent inconsistency between this latter action of the Circuit Court of Appeals and our holding in *Cone v. West Virginia Paper Co.*, 330 U. S. 212.

In the *Cone* case we held that the Circuit Court of Appeals was without power to order the entry of final judgment for the loser of a jury verdict in the District Court where he had failed to follow his motion for directed verdict with a timely motion for judgment as required by Rule 50 (b). We pointed out in the *Cone* case that Rule 50 (b) vested district judges with a discretion, under the circumstances outlined in the rule, to choose between two alternatives: (1) reopening the judgment and granting a new trial, and (2) ordering the entry of judgment as if the losing party's request for directed verdict had been granted by the trial judge.

It is urged that the reasons which supported the *Cone* decision are not relevant here because, unlike the *Cone* case, the jury in this case returned its verdict under specific directions of the trial judge. However significant this variance between the two cases might be for some purposes, it is of no importance here. By its terms the rule applies equally to cases where the verdict returned by the jury was not directed, as in the *Cone* case, or was directed, as in this case.

Furthermore, the very circumstances which arose in this case emphasize the importance of having the District Court first pass upon whether its error should result in a new trial or in a judgment finally ending the contro-

versy. For there is here a dispute between the parties whether all or certain parts of a deposition containing important evidence were properly introduced in the trial court. Both parties took the position in the Circuit Court of Appeals that some, though different portions of the deposition, were properly presented in evidence. The Circuit Court of Appeals decided the case on the assumption that no part of the deposition was ever admitted as evidence. In this Court respondents argue that no part of the deposition was ever read to the jury and therefore no part of it can be considered as introduced in evidence. Whether this deposition or any part of it was properly before the court, and even if it were not before the court, whether the ends of justice required that a new trial be granted in order that the evidence it contained might properly be offered, were questions which the petitioner was entitled under Rule 50 (b) to have passed upon in the first instance by the trial court. What we said in the *Cone* case is peculiarly appropriate here: "The determination of whether a new trial should be granted or judgment entered under Rule 50 (b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." It was error therefore for the Circuit Court of Appeals to direct the District Court to enter judgment for the respondents.

Petitioner also strongly urges that the evidence in the District Court was such that the trial judge was justified in directing a verdict in its favor and that the judgment resting on that verdict should be reinstated. Whether a verdict should have been directed, however, depends upon a number of factors, including an interpretation of the law of Illinois where the contract was made, a proper interpretation of the pleadings, a determination whether the disputed deposition was admitted in evidence in whole or in part, and the effect of that evidence if admitted.

Under these circumstances, the judgment of the Circuit Court of Appeals in reversing and remanding the cause to the District Court is affirmed. But since the respondents made no motion for judgment under Rule 50 (b), it was error to direct the District Court to enter a judgment in their favor. The case should go back to the District Court for a new trial.

It is so ordered.